United Nations A/CN.4/693

General Assembly

Distr.: General
8 March 2016

Original: English

**International Law Commission**
**Sixty-eighth session**
Geneva, 2 May-10 June and 4 July-12 August 2016

# First report on *jus cogens* by Dire Tladi, Special Rapporteur*

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* The Special Rapporteur wishes to thank the German Research Foundation (DFG), and in particular Professor Georg Nolte, whose generous invitation enabled the Special Rapporteur to write this report as a fellow of the Berlin Potsdam Research Group on the International Rule of Law at the Humboldt University in Berlin. Particular gratitude is owed to Julian Kulaga, a student assistant with the research group, who voluntarily translated several of the German texts referred to in this report. The Special Rapporteur would also like to thank the following individuals for their invaluable research into various aspects covered in this report: Emily Buist-Catherwood (New York University); Manar Mohsen (Geneva Academy of International Humanitarian Law and Human Rights); Mawuse Vormawor (Harvard University); Tjasa Tanko and Evelyn Mogere (Max Planck Institute for Procedural Law, Luxembourg); Aniel de Beer (University of Pretoria); Romain Pinchon (Aix-Marseille Université, Council of Europe); Marija Đorđeska (George Washington Law School); Christina Hioureas, Amy Belsher and Aldana Rohr (Buenos Aires University); and Annelize Nienaber (University of Pretoria). I am also grateful to the Codification Division of the Office of Legal Affairs for its research assistance. I am also thankful to everyone who read and provided comments on the earlier drafts of this report.

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# I. Introduction

1. During its sixty-sixth session (2014), the Commission decided to place the topic "*Jus cogens*" on its long-term programme of work.[1] The General Assembly, during its sixty-ninth session, took note of the inclusion of the topic on the Commission's long-term programme of work.[2] At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur. The General Assembly has since taken note of this development.[3]

2. This first report serves two primary purposes and proposes three draft conclusions identifying the scope of the topic and setting out the general nature of *jus cogens* international law. The first purpose of the report is to set out the Special Rapporteur's general approach on the topic and, on that basis, to obtain the views of the Commission on the preferred approach. The second purpose is to give a general overview of conceptual issues relating to *jus cogens*. Both the general approach and the conceptual issues will necessarily be provisional. They will need to be reassessed and, perhaps, adjusted as work on the topic continues. In other words, the work on the topic will necessarily need to be fluid and flexible to allow for adjustment as the project proceeds.

3. The first purpose of the report concerns methodological questions relating to the overall consideration of the topic. There are a number of methodological questions that the nature of the topic raises. First among these is the chronological order in which the main issues identified in the syllabus will be addressed.[4] The second issue concerns the relative weight to be accorded to various materials. There is far more literature on the subject of *jus cogens* than there is State practice or jurisprudence. This raises the question of how the Commission is to approach the materials for the purpose of arriving at conclusions. A third methodological question concerns whether the project should aim to provide, as indicated in the syllabus, an illustrative list of norms that currently qualify as *jus cogens* or whether it would be best not to include such a list. Finally, the report will also cover, as a methodological issue, the work programme.

4. The second purpose, a general overview of the conceptual issues, is more substantive. It concerns, principally, the nature and definition of *jus cogens*. While there are other conceptual issues, such as the relationship between *jus cogens* and *erga omnes* obligations as well as the relationship between *jus cogens* and non-derogation, that could have been addressed in the present report, the Special Rapporteur felt it prudent to address those issues in subsequent reports. The relationship between *erga omnes* obligations and *jus cogens* will be considered as part of the consequences or effects of *jus cogens*, while the issue of non-derogation

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[1] *Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May-6 June and 7 July-8 August 2014), Official Records of the General Assembly, Sixty-Ninth Session, Supplement No. 10* (A/69/10), para. 268 and annex. An earlier proposal, by Mr. Andreas Jacovides, to include the topic on the Commission's programme of work is available in *Yearbook... 1993*, vol. II (Part One), A/CN.4/454, at p. 213.

[2] See para. 8 of General Assembly resolution 69/118 of 10 December 2014.

[3] See para. 7 of General Assembly resolution 70/236 of 23 December 2015.

[4] The syllabus identified four main issues for considerations, namely: (a) the nature of *jus cogens;* (b) requirements for the identification of *jus cogens;* (c) an illustrative list of norms; (d) the consequences or effects of *jus cogens*. See n 1, annex, para. 13.

clauses in human rights treaties will be treated in the second report on the identification of norms having a peremptory character. The present report is, therefore, limited to identifying the core nature of *jus cogens*. This question will be addressed on the basis of a brief historical survey of *jus cogens*, the practice of States, the previous work of the Commission, jurisprudence and the literature. As already stated, questions of definition and, in particular, of the nature of *jus cogens*, will need to be revisited as the project proceeds and as more practice is evaluated.

5. Prior to addressing the questions identified above and in order to provide an important context, the report will begin in section II by briefly surveying the views expressed by States in relation to the inclusion of this topic on the agenda of the Commission. Section III of the report will then address, briefly, the methodological questions identified above. Section IV will provide a historical evolution of *jus cogens*, with a view to revealing its current nature and identifying its core elements. Section V will provide a general synthesis of the nature of *jus cogens* and offer a working definition. Section VII will propose three draft conclusions, while section VIII will set out the future work programme.

## II. Debate in the Sixth Committee on the topic

6. It is useful to begin by setting out that, on the whole, States were welcoming of the decision of the Commission to include the topic, first in its long-term programme of work and subsequently on its current programme of work. To illustrate, in 2014, of the 18 statements commenting on the Commission's decision to include the topic on its long-term programme of work, 13, representing 48 States, expressed support for the inclusion. Two States were ambiguous. Poland proposed an additional topic connected to *jus cogens*, namely the duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of *jus cogens*, without expressing a view on the current topic, while Japan expressed both scepticism and interest in the topic. Only three States, namely France, the Netherlands and the United States of America, expressed doubts as to the viability and appropriateness of the Commission taking up the topic.[5]

7. Similarly, in 2015, a large number of States expressed support in the Sixth Committee for the inclusion of the topic on the agenda of the Commission.[6] A few, however, continued to express reservations concerning the Commission's decision to include the topic on its agenda.[7] Some States, including those generally in

[5] The United States "did not believe it would be productive for the Commission to add the topic of *jus cogens* to its agenda", A/C.6/69/SR.20, para. 123. France was "sceptical about the possibility of reaching a consensus on the topic", A/C.6/69/SR.22, para.36. In the view of the Netherlands "it was hard to determine a specific need among States with regard to the codification or progressive development of the notion of *jus cogens*", A/C.6/69/SR.20, para. 13.

[6] See, e.g. statement by Ecuador (on behalf of CELAC), A/C.6/70/SR.17, para. 32; statement by Peru, A/C.6/70/SR.17, para. 51; statement by Romania, A/C.6/70/SR.17, para. 96; statement by the United Kingdom, A/C.6/70/SR.18, para. 9; statement by Japan, A/C.6/70/SR.18, para. 23; and statement by El Salvador, A/C.6/70/SR.18, para. 50.

[7] In addition to the three States that expressed reservations at the sixty-ninth session, see the statement by Israel, A/C.6/70/SR.18, para. 6. See also the statement by China, A/C.6/70/SR.18, para. 19, which requests the Commission to "collect information on State practice before undertaking an in-depth study on the topic". See also statement by the Netherlands, A/C.6/70/SR.17, para. 78; statement by France, A/C.6/70/SR.20, para. 25 and statement by the United States A/C.6/70/SR.19, para. 17.

support of the topic, stated that the Commission should approach the topic with caution.[8]

8. A significant number of States noted that while there was a general acceptance of the concept of *jus cogens*, its precise scope and content remained unclear.[9] Many of these States took the view that the Commission's study of the topic could help bring clarity to international law relating to *jus cogens*.[10] There have, however, been differences in points of emphasis. Some States took the view that all four elements identified in the syllabus should be addressed.[11] Many States have taken the view that the greatest contribution that the Commission could make to the understanding of *jus cogens* is in the area of the requirements for the elevation of a norm to the status of *jus cogens*.[12]

9. There was, however, more division on whether the Commission should provide an illustrative list. Several States, including those generally supportive of the topic, raised some concern about the illustrative list. The Nordic States, while noting the Commission's caution that an illustrative list would by definition not be exhaustive, expressed concern that an illustrative list would entail a risk that other equally important rules of international law would in effect be given an inferior status.[13] In a similar vein, Spain suggested that the production of a list, even if carefully caveated as an illustrative list, would come to be seen as a *numerus clausus*.[14] South Africa, in its statement, raised the question whether an illustrative list would, even if it were reliable at the time of its publication, eventually be incomplete.[15] Nonetheless, a number of States felt that producing an illustrative list would provide an important contribution to international law. Slovakia said that it "looked forward to seeing *jus cogens* norms identified".[16] Austria similarly expressed the view that the Commission "should establish an illustrative list of norms which had achieved the status of *jus cogens*".[17] For the United Kingdom of Great Britain and Northern Ireland, equally as important as identifying which norms

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[8] See, e.g. statement by Spain, A/C.6/70/SR.18, para. 60.

[9] See, e.g. statement by Austria, A/C.6/69/SR.19, para.110; statement by Finland (on behalf of the Nordic States), A/C.6/69/SR.19 at 86; statement by Japan, A/C.6/69/SR.20, para. 50; and statement by the Slovak Republic, A/C.6/69/SR.20, para. 76. South Africa stated that "the concept of *jus cogens* norms remained nebulous", A/C.6/69/SR.20, para. 109. France noted the "disagreement about the theoretical underpinnings of *jus cogens*, [and that] disagreements about its scope of application and its content remained widespread", A/C.6/69/SR.22, para. 36.

[10] See, e.g. Nordic statement, ibid., at para. 86. See also statement by the United Kingdom ("The Commission's work would help to elucidate what was — and, equally important, what was not — encompassed within the concept of *jus cogens*"), A/C.6/69/SR.19, para.178; statement by El Salvador, A/C.6/69/SR.20, para.91; statement by South Africa, ibid., para. 109; statement by New Zealand, A/C.6/69/SR.20, at para. 33; and statement by Cyprus, A/C.6/69/SR.24, para. 69.

[11] See, e.g. statement by Austria (n 5), para. 110; statement by the United Kingdom, ibid., para. 178. See also statement by Romania, A/C.6/69/SR.19, para. 146.

[12] See statement by South Africa (n 9), para. 109. See also Nordic statement (n 9), 86 (Commission's work might contribute "to clarifying the exact legal content of *jus cogens*, including the process by which international norms might qualify as peremptory norms"). The Netherlands, though not supportive of the project, noted that there "might be merit in providing a broad overview of the way in which it was determined that *jus cogens* was conferred on a particular rule", statement by The Netherlands (n 5), para. 14.

[13] Statement by the Nordic States (n 9), para. 87.

[14] Statement by Spain, A/C.6/69/SR.21, para. 42.

[15] Statement by South Africa (n 9), para. 113.

[16] Statement of the Slovak Republic (n 9), para. 76.

[17] Statement of Austria (n 9), para. 110.

had reached the level of *jus cogens,* was the question which norms had not reached that level.[18] New Zealand, on the other hand, adopted a wait-and-see approach, suggesting that basic work on the requirements for elevation to the status of *jus cogens* should "form the basis of the consideration of whether it would be productive to undertake the even more difficult task of developing an illustrative list of norms that had achieved the status of *jus cogens*".[19]

10. Many delegations reflected on the growth of jurisprudence on the topic of *jus cogens.* The statement by Finland, on behalf of the Nordic States, referred to decisions at both "the international and national levels" invoking *jus cogens.*[20] It was felt that the consideration of this topic by the Commission would help judges, especially judges in domestic courts, in understanding the concept of *jus cogens,* which was now invoked more and more frequently.[21] The question of judicial practice has, however, raised an important methodological question. Some States suggested that the consideration of the topic should be based on relevant State practice rather than judicial practice. Indeed, the statement by the United States, expressing non-support of the project, was based partly on the fact that the syllabus, while containing a helpful overview of the treatment of *jus cogens* by the International Court of Justice, referenced few examples of actual State practice.[22] This may suggest that if the Commission does embark on the topic, it should do so on the basis of actual State practice rather than solely on the basis of judicial practice. Other States, most notably the Nordic States, expressed the view that the consideration of the topic should be based on judicial practice, in particular the jurisprudence of the International Court of Justice.[23]

11. Most States recognized that the importance of the topic required that the Commission approach it with care and sensitivity. Trinidad and Tobago, for example, while welcoming the inclusion of the project in the long-term programme of work of the Commission, stressed that it "should be addressed with due care and circumspection".[24] The Special Rapporteur agrees with these words of caution and intends to take great care in ensuring that his reports will reflect contemporary practice and not stray into untested theories. In particular, it should be emphasized that the object of the Commission's study of the topic is not to resolve theoretical debates — although these will necessarily have to be referred to — but rather to provide a set of conclusions that reflect the current state of international law relating to *jus cogens.*

[18] Statement by the United Kingdom (n 10), para. 176.

[19] Statement by New Zealand (n 10), para. 33.

[20] Nordic statement (n 9), para. 85. For other statements suggesting existence of jurisprudence on *jus cogens*, see statement of South Africa (n 9), paras 108, 109 and 110; statement by the Republic of Korea, A/C.6/69/SR.20, para. 46; statement by the United States (n 5), para. 123.

[21] See Nordic statement (n 9), para. 85, and statement by South Africa (n 9), para. 86. See also statement by Romania (n 11), para. 146.

[22] See statement by the United States (n 5), para. 123.

[23] See Nordic statement (n 9), para. 85.

[24] Statement by Trinidad and Tobago, A/C.6/69/SR.26, para. 118. See also statement by Japan, A/C.6/69/SR.20, para. 50 ("Commission should therefore proceed prudently and on solid bases"); New Zealand (n 10), para. 33 (called for a "careful and detailed analysis by the Commission"); and statement of the Republic of Korea (n 20), para. 46.

## III. Methodological approach

12. The syllabus identifies four substantive elements to be addressed by the Commission, namely the nature of *jus cogens*, the requirements for the elevation of a norm to the status of *jus cogens*, the establishment of an illustrative list of norms of *jus cogens* and the consequences or effects of *jus cogens*. All of these issues are, in some way, interrelated. The nature of *jus cogens* will undoubtedly influence the requirements. The theoretical underpinnings of *jus cogens* will influence the rules applicable to the elevation of a norm to a norm of *jus cogens*. A positive law approach, for example, is more likely to be associated with the so-called double-consent theory,[25] while a natural law approach is likely to rely on values independent of the will of States.[26] Moreover, both the nature of *jus cogens* and the requirements for elevation are central to a determination of which norms constitute *jus cogens*. Yet much would be learned about the nature and the requirements of *jus cogens* from an analysis of some norms that qualify as *jus cogens*. As will become evident, the Vienna Convention on the Law of Treaties defines *jus cogens* in terms of its consequences — "a norm from which no derogation is permitted".[27] Thus, the question of the consequences also influences and is influenced by the other three elements.

13. The interconnected nature of the elements identified in the syllabus raises the methodological question about the sequence of the study. This question of sequencing might be said to depend on whether one adopts a deductive or an inductive approach. In the view of the Special Rapporteur, it is not necessary to adopt a firm approach on this methodological question. Rather, recognizing the interconnected nature of the elements, the Special Rapporteur intends to adopt a fluid and flexible approach. At times draft conclusions, either proposed or adopted, will need to be reconsidered in the light of new determinations on subsequent elements. To avoid unnecessary complications, the adaptations can be done prior to the adoption of draft conclusions on first reading. Bearing this in mind, the Special Rapporteur intends to follow the sequence of the elements as proposed in the syllabus.

14. One methodological issue that arises from the debates in the Sixth Committee is whether the work of the Commission should be based on State practice, jurisprudence or writings. As described above, the question of the role of State practice may explain, at least partly, the hesitance of some States to fully embrace the topic.[28] In the view of the Special Rapporteur, there is no need to depart from the Commission's normal method of work. The Commission should proceed on the established practice of considering a variety of materials and sources, in an integrated fashion. As is customary, the Commission approaches its topics by

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[25] See, e.g. Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law* (Helsinki, 1988), at 12 ("Art. 53 requires 'double consent'"). See Jure Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" in Erika de Wet and Jure Vidmar (Eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford, 2012), at 25.

[26] See, e.g. Mark Janis "The Nature of *Jus Cogens*" in Larry May and Jeff Brown (Eds.) *Philosophy of Law: Classical and Contemporary Readings* (Chichester, 2010).

[27] Art. 53 of the Vienna Convention. See Robert Kolb *Peremptory International Law: Jus Cogens* (Oxford, 2015), at 2 ("In other words, *jus cogens is* defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation").

[28] See statement by the United States (n 5), para. 123.

conducting a thorough analysis of State practice in all its forms,[29] judicial practice, literature and any other relevant material. As is the case with the other topics, the Commission will need to assess the particular weight to be given to the various materials.

15. As discussed above, delegations in the Sixth Committee have expressed differing views concerning the proposal to provide an illustrative list. Some States expressed concern that an illustrative list, no matter how carefully the Commission explained that it is only an illustrative list, will still come to be seen as a closed list. However, in the view of the Special Rapporteur, the Commission should not refrain from producing an illustrative list only because, despite clear explanations to the contrary, such a list might be misinterpreted as being an exhaustive list.

16. Nonetheless, there may be different reasons to reconsider the illustrative list. The topic, as proposed in the syllabus, is inherently about process and methodology rather than the content of specific rules and norms. In other words, like the Commission's consideration of the topic of customary international law, it is not concerned with the substantive rules; rather, the present topic is concerned with the process of the identification of the rules of *jus cogens* and its consequences. An illustrative list might have the effect of blurring the fundamentally process-oriented nature of the topic by shifting the focus of discussion towards the legal status of particular norms, as opposed to the identification of the broader requirements and effects of *jus cogens*.

17. However, even without providing an illustrative list, the Commission would need to provide some examples of *jus cogens* norms in order to provide some guidance about what norms constitute *jus cogens*. In other words, by addressing various elements of the topic, such as the nature of *jus cogens*, the criteria for elevation to the status of *jus cogens* and the consequences of *jus cogens*, the Commission would, in the commentaries, need to provide examples to substantiate its conclusions. In this way there would, even if indirectly, be an illustrative list. The Commission may even decide, at the end of its consideration of the topic, to collect the examples used in the commentaries of norms of *jus cogens* and place them in an annex as an illustrative compilation of norms that have been referred to. The Special Rapporteur would be grateful for the views of the Commission — and indeed Member States — on this very important question. In particular, comments might focus on whether to have such an annex at all; if it were decided to have such an annex, how to determine which examples to refer to, for example, whether only norms on which the Commission agreed met the criteria for *jus cogens*, all norms that had been used by the Commission to exemplify aspects of *jus cogens* or norms in court judgements that the Commission had relied upon.

[29] According to draft conclusion 6 of the draft conclusions on the identification of customary international law, adopted by the Drafting Committee, "forms of State Practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts". See A/CN.4/L.869.

# IV. Historical evolution of the concept of *jus cogens*

## A. Period before the Second World War

18. The nature of *jus cogens* in modern international law is shaped by what can be described as a rich history. Some authors trace the rise of the *jus cogens* in international law to the first half of the twentieth century, often referring to the influential work of Alfred Verdross.[30] Both the concept, or idea, and the principle that international law contains within it the fundamental norms which cannot be derogated from, however, can be traced much further back.[31] A caveat is necessary here. While the historical analysis below may have some influence on the identification of some elements of *jus cogens*, the primary purpose of this historical survey is only to identify developments that have contributed to the evolution of *jus cogens*. Some of the developments, while perhaps similar to *jus cogens*, will themselves not constitute *jus cogens*. The conclusion should not be reached that the developments are themselves illustrations of peremptory norms in international law. Rather, they laid the groundwork for the acceptance of peremptory norms in international law.

19. It appears that the idea of non-derogable rules of law has its antecedents in classical Roman law. The term *jure cogente* (*jus cogens*) itself first appears, albeit in an unrelated context, in the *Digest* of Justinian.[32] However, the idea of rules from which no derogation was permitted can itself be found in Roman law. In several passages in the *Digest*, there appears the observation that "*Jus publicum privatorium pactis mutari non potest*", literally, "private pacts cannot derogate from public law".[33] According to Kaser, "*jus publicum*" has a wider meaning than "public law" and refers to all those rules from which individuals may not depart by separate agreements.[34] Put another way, *jus publicum* referred to rules from which no derogation, even by agreement, was permitted — what may be termed *jus cogens*.[35] Similarly, the *Codex* of Justinian states: "*Pacta, quae contra leges constitutionesque*

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[30] Markus Petsche "*Jus Cogens* as a Vision of the International Legal Order" (2010) 29 *Penn State International Law Review* 233, at 238-239. See also Levan Alexidze "The Legal Nature of *Ius Cogens* in Contemporary International Law" (1981-III) 172 *Recueil de Cours de l'Académie de droit international de La Haye* 229, at 228 noting that "in the theory of international law the term *jus cogens* has appeared rather recently (from the beginning of the 1930s)". See Alfred Verdross "Forbidden Treaties in International Law" (1937) 31 *American Journal of International Law* 571. But see Paul B Stephan "The Political Economy of *Jus Cogens*" (2011) 44 *Vanderbilt Journal of Transnational Law* 1073, at 1081, footnote 21, that the earliest reference to *jus cogens* in the Westlaw database is in Ernest G Lorenz "Commercial Arbitration – International and Interstate Aspects" (1934) 43 *Yale Law Journal* 716. See also Jochen Frowein "*Ius Cogens*" in Rudiger Wolfrum (ed.) *Max Planck Encyclopaedia of Public International Law* (2012, online edition), at 1 stating that "from the perspective of international law as it stood in the first part of the 20th century, *ius cogens* seemed hardly conceivable, since at that time the will of States was taken as paramount".

[31] For a detailed history of the concept, or idea, and the term *jus cogens*, see Carnegie Endowment for International Peace "The Concept of Jus Cogens in Public International Law" in *Papers and Proceedings: Report of a Conference in Lagonisi, Greece, April, 1966* (Geneva, 1976) at 18.

[32] See D. 39.25 Pr 1.29 in which Papinius states: "*Donari videtur quod nullo jure cogente conceditur*" (Loosely translated as a "Donation is that which is given other than by virtue of right").

[33] D. II 14.38. The quote also appears at D. XI 7.

[34] Max Kaser *Das Römische Privatrecht* (Munich, 1955), at 174-175.

[35] Carnegie Endowment (n 31) at 18.

*vel contra bonos mores fiunt, nullam vim habere indubitati iuris est*",[36] which means "agreements contrary to laws or constitutions, or contrary to good morals, have no force". This idea that agreements contrary to good morals have no force of law played a role in the emergence of *jus cogens*.

20. In a 1965 report by eminent jurists, including Eric Suy, it is stated that the term *jus cogens* could be found "in no text prior to the 19th Century" but that the idea of a superior law, from which no derogation was permitted "runs like a thread through the whole theory and philosophy of law".[37] The report traces the first use of the phrase *jus cogens* to the pandectists — a nineteenth century German movement that was devoted to the study of Justinian's *Digest* (also known as the Pandects) — who accepted "as self-evident the distinction between '*jus cogens*' and '*jus dispositivum*'".[38]

21. However, the idea that there are some rules of international law that apply independent of the will of States existed much earlier than the nineteenth century and is often credited to writers such as Hugo de Groot (commonly known to international lawyers as "Grotius"), Emer de Vattel and Christian Wolff.[39] Those writers represented natural law thinking, which itself can be traced to Greek philosophy, which presupposed the existence of a "body of laws" that was "fundamental and unchangeable and often unwritten".[40] The first chapter of the first book of Grotius's *De Jure Belli Ac Pacis* is littered with references to immutable law, which, in his view was natural law.[41] In an often quoted passage, he stated, that "the law of nature is so unalterable that God himself cannot change it. For instance then, since God cannot effect, that twice two should not be four, so neither can he, that what is intrinsically evil, should not be evil".[42] He identifies not only that the law of nature is unchangeable, but also that it is "just" and "universal".[43] Vattel, building on Grotius's doctrine, states that the "necessary law of nature is immutable" and that because of this, States "can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release

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[36] *Domini Nostri Sacratissimi Principis Iustiniani Codex, Libri Secundus*, 2.3.6.

[37] Carnegie Endowment (n 31) at 19.

[38] Ibid.

[39] See Alexidze (n 30), at 228 who states: "the fathers of the bourgeois science of international law – Francisco de Vitoria, Francisco Suarez, Ayala Balthazar, Alberico Gentili, Hugo Grotius – stressed the peremptory character of rules of natural law, placing it above positive law." See also A. Jacovides "Treaties Conflicting with Peremptory Norms of International Law and the Zurich-London Agreement" in Andrew Jacovides (ed.) *International Law and Diplomacy* (The Hague, 2011), at 18.

[40] For a full history of the evolution, see Lord Lloyd of Hampstead and MDA Freeman *Lloyd's Introduction to Jurisprudence* (London, 1985), at 106 *et seq*.

[41] Hugo Grotius *The Rights of War and Peace in Three Books* (Paris, 1652, translated by J Barbeyrag, 1738).

[42] *Id.* in Book 1, Chapter I, Section X.5. See also Book 1, Chapter I, Section XVII ("it follows that what the law allows cannot be contrary to the law of nature").

[43] *Id.*, Book 1, Chapter I, XVII.1 ("since the law of nature ... is perpetual and unchangeable, nothing could be commanded by God, who can be unjust, contrary to this law"); Book 1, Chapter I, X.6 ("though the law of nature, which always remains the same, is not changed, but the thing concerning which the law of nature determines [may undergo some changes]"); Book 1, Chapter I, III.1 ("Now that is unjust which is repugnant to the nature of society of reasonable creatures"); Book 1, Chapter I, Section XII ("Law of Nature, [which] is generally believed to be [universal] by all, or at least, the most civilized nations. For a universal effect requires a universal cause. And there cannot well be any other cause assigned for this general opinion, that what is called common sense.")

from the observance of it".[44] This, he continues, "is the principle by which we may distinguish lawful conventions or treaties from those that are unlawful, and innocent and rational customs from those that are unjust or censurable".[45] Natural law thinkers, who dominated the doctrinal landscape of the seventeenth century, readily accepted the idea that natural law was immutable and that positive law — treaty law and customary international law — had to be consistent with natural law.[46]

22. The rise of the positivist law approach to international law in the nineteenth century saw the emergence of sovereignty and the will of the State as the dominant theory to understanding international law and its binding force.[47] In turn, natural law theories, and with them the idea of immutable law, gradually receded into the background. Yet natural law approaches to international law, even in the era of positivism, had not been totally eradicated and could be seen in the legal literature of the nineteenth and twentieth centuries.[48] Hannikainen identifies writers who, in the nineteenth century, relied on natural law thinking — or at any rate on elements outside of positive law — as well as those that relied on positive law for the idea that there were rules of international law that protected the interests of the international community from which it was not possible to contract out of, that is, from which no derogation was permitted.[49] Moreover, even with the rise of positivism, the idea that there were certain rules that served the common interest persisted.[50] To this end, Alexidze points out that the "positivists of the nineteenth and twentieth centuries, except the most radical ones, did not accept full freedom of the will of States making a treaty and attached peremptory character to 'universally

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[44] Emer de Vattel *Law of Nations, or Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns* (1758, translated by CG and J Robinson, London, 1797), at § 9.

[45] *Ibid.*

[46] See J.L. Brierly *The Law of Nations: An Introduction to the International Law of Peace* (Oxford, 6th Edition, edited by Humphrey Waldock, 1963), at 18-20.

[47] On the rise of positivism in international law, and its influence on law-making, see Dire Tladi and Polina Dlagnekova "The Will of the State, State Consent and International Law: Piercing the Veil of Positivism" (2006) 21 *SA Public Law* 111, at 112 *et seq.*

[48] See, e.g., Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio Histórico crítico* (Mexico, 1982), at 5-6 referring to the writings of Christian Friedrich Glück and Bernhard Windscheid.

[49] Hannikainen (n 25), at 45-48. Writers who, according to Hannikainen advanced natural law, or natural law-like, explanations for rules that could not be derogated from included the following: Phillimore *Commentaries upon IL* Vols I-II (1879), von Martens, *Precis de Droit de gens* (1864), Kolhler *Grundlagen des Volkerrechts*, (1918). Writers who, according to Hannikainen, explained the idea of compelling rules using positive law doctrines include Ottfried Nippold *Der Völkerrechtliche Vertrag – seine Stellung im Rechtssystem und seine Bedeutung fur das international recht* (1894).

[50] Hannikainen (n25), at 35. See also Lassa Oppenheim *International Law: A Treatise* (London, 1905), at 528 and William Hall, *A Treatise on International Law*, (8th Edition 1924, originally published in 1884), 382-83 (asserting that "fundamental principles of international law" may "invalidate[], or at least render voidable," conflicting international agreements). See also Christian Tomuschat "The Security Council and *Jus Cogens*" in Enzo Cannizzaro (ed.) *The Present and Future of Jus Cogens* (Rome, 2015), at 11, who more cautiously states that "even during the 19th century when natural law justifications for law had been definitively abandoned and increasingly the doctrine of positivism had been embraced in the sense that international law emerges from the coordinated will of States, some authors held that there was some hierarchically superior layer of norms which set the limits on the treaty-making powers of States."

recognized by civilized States' basic principles of international law".[51] In 1880, Georg Jellinek wrote that a treaty can be invalid if its obligations are impossible to perform, and that impossibility consists of both physical and moral impossibility.[52] This ambivalence of positivism towards the ideal of an "immutable law" is aptly explained by Hans Kelsen in his *Pure Theory of Law*.[53] Ottfried Nippold, for example, recognizes that immoral treaties, such as treaties permitting slavery, would be invalid under international law.[54] However, this conclusion is based entirely on positive law, and existing treaties.[55] Hannikainen himself, having assessed the

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[51] See Alexidze (n 30), at 229. See, e.g. Antoine Pillet "Le Droit International Public, Ses Éléments Constitutifs, Son Domaine, Son Object" (1894) 1 *Revue Générale de Droit International Public* 1, at 20, who invokes a "droit absolu et impérieux" ("*an absolute and compelling law*"), which is the "le droit commun de l'humanité" ("*the common law of humanity*"). Antoine Pillet, at 13-14, does not equate this common law of humanity with classical natural law, in part, because "la pratique des nations a toujours reconnu et observe" the common law of humanity ("*the practice of nations has always recognized and observed*" the common law of humanity). See also Antoine Rougier "La Théorie de l'intervention d'humanite" 1910 *Revue Générale de Droit International Public* 468, whose postulation about "l'existence d'une règle de droit supérieure aux legislations positives, le droit humain" ("*the existence of a rule of law superior to positive law, human law*") might sound like an invocation of natural law, declares that 'la notion de droit natural, beaucoup plus morale que juridique ne permattait pas d'arriver à precision suffisante dans la determination des actes permettait ou prohibiter cette règle suprême" ("*the notion of natural law much more moral than legal did not allow the achievement of sufficient accuracy in determining the acts that are permitted or prohibited by the supreme rule*").

[52] Georg Jellinek *Die Rechtiliche Natur der Staatenverträge: Ein Beitrag Zur Juristichen Construction des Volkerrechts* (Wien, 1880), at 59-60 (Daher kann ein vertrag nur zu stande kommen, wenn eine zulässige *causa* vorharden ist. Dass nur das rechtlich und sittlich mögliche gewollt warden darf, ergbit sich vor Allem aus der erwärgung dass man durch die zulässigkeit des rechtlich und sittlich unmöglichen als vertragsinhaltes dem volkenrechliche unrecht könnte ja sonst dadurch zum rechte erhoben werben, dass man es zum rechtsgiltigen inhalt eines vertrages erhebt …[und] ganze vertrasgrecht wäre somit illusorisch. Was inbesonndere das sittliche mögliche anbelagnt, so folgt die ausschliessliche zulässighkeit derselben als vertraginshalt aus dem ethischen character des rechts, welches seiner natur nach nie das aus dem ethischen gebiete gänzlich ausgewiesen billigen darf. ["*..a treaty can only be concluded, if a permissible* causa *exists. The reason why one must only want the legally and morally possible derives primarily from the consideration that by permitting the legally and morally impossible as the content of the treaty one would pull the rug out from under the feet of international law. Every injustice under international law could be elevated to law by elevating it to the legally binding content of a treaty …[and] the entire international law could become just an illusion. In regard to the morally possible, its exclusive permissibility as the content of a treaty follows from the ethical character of law, which by its nature must not approve of what is completely rejected by the ethical domain*"]). See also Tomuschat (n 50), at 11, discussing the work of Wilhelm Heffter, who similarly relied on legal and moral impossibility as a positive law basis for the invalidity of treaties.

[53] Hans Kelsen *The Pure Theory of Law: Its Method and Fundamental Concepts*, 1934, translation by Charles H Wilson in (1934) 50 *The Law Quarterly Review* 474, at 483-484 (Chapter II, para. 10) ("Law is, indeed, no longer presumed to be an eternal or absolute category … The idea of an absolute legal value, however, is not quite lost but lives on in the ethical notion of justice which positivist jurisprudence continues to cling …The science of law is not yet wholly positivistic, though predominantly so").

[54] Nippold (n 49), at 187.

[55] Ibid. at 187 ("Die beispiele welche die völkerrecchtliche geltung jenes postulates beweisen sollen dürfen nur aus positven vertragen geschöpf warden. Sobald man anfängt selbst beispiele zu konstruien, predigt man – naturrecht." ["*The examples, which ought to prove the validity of these posits under international law, must only be acquired from positive treaties. As soon as one starts to construct examples by oneself, one starts to preach - natural law*"])

literature of the period prior to the end of the Second World War, makes the following observation about the idea of peremptory norms:

> it *cannot* be *concluded* that doctrine offered weighty evidence for the illegality or invalidity of treaties having an unlawful object. However, there was a great deal of insistence on the illegality or invalidity of such treaties, revealing the conviction of many writers that there were certain norms of an absolute character protecting the vital common interests of States and the international order and permitting no derogation.[56]

23. The essence of the statement is that while there were much doctrinal assertions about the illegality of treaties on the basis of non-derogable rules, there was little evidence in the form of State practice to support those assertions. Nonetheless, Hannikainen's account suggests that writings postulating non-derogability decreased, both in terms of quantity and intensity.[57] True though this may be, Hannikainen himself identified that in the nineteenth century already, "the prohibition of piracy was a deeply entrenched rule and that pirates were considered as *hostis humani generis* (enemies of mankind)."[58] Presumably, therefore, States could not agree, even at that stage, to enter into treaties to facilitate the commission of piracy. On the historical fact of performance of immoral treaties concluded in history as State practice, Jellinek notes that the "legal effect flowing from this is as insignificant as the legal effect under private law that follows from the fact that a myriad of unethical contracts are concluded and performed".[59] Thus, even in the positive law-dominated era of the late nineteenth and early twentieth centuries, before the First World War, the idea of rules from which States could not contract out, seems to have been accepted, at least in the doctrine.

24. The period after the First World War saw a resurgence of the doctrine of higher norms. The adoption of the Covenant of the League of Nations played a significant role in the mainstreaming of the idea of non-derogable rules as an important stream of international law thinking. Hannikainen, for example, illustrates peremptory norms, or something akin to it, by referring to the Covenant of the League of Nations.[60] There are, of course, a number of provisions in the Covenant of the League of Nations that resonate with ideas of peremptoriness, which is not to say they are *jus cogens*.[61] First, as can be seen from the historical evolution described above, the idea of "community" or "common interest" is an important element of any understanding of non-derogability — whether based on natural or positive law ideas. Article 11 of the Covenant declares that "war or threat of war [...is] a matter of common concern to the whole League". More importantly, Article 20 of the Covenant provided that the Covenant abrogated all obligations inconsistent with its terms and that members would "not enter into any engagements inconsistent" with the terms of the Covenant. Being itself a treaty rule, applicable only to parties to the treaty and subject to amendment and even abrogation by any later agreement, Article 20 could not be advanced as an example of peremptoriness, at least in the classical understanding of *jus cogens*. Nonetheless, it is an important illustration of the evolution in State practice of non-derogability based on core values of the

[56] Hannikainen (n 25), at 48-49.
[57] Ibid.
[58] Ibid. at 36.
[59] Jellinek (52), at 59.
[60] Hannikainen (n 25), at 114-116.
[61] Covenant of the League of Nations, adopted in Paris on 29 April 1919.

international community. This evolution was captured, in the period between the wars, by Alfred Verdross's famous article about forbidden treaties. Basing his approach on natural law, he wrote that "[n]o juridical order can ... admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community".[62] Indeed Verdross, himself a member of the Commission, stated that the Commission's texts on *jus cogens* in the draft articles were influenced by this article.[63] Stephan writes that it was the horrors of the Second World War, and Nazi atrocities in particular, that compelled legal scholars to "try on the concept [of *jus cogens*] as a means of grappling" with these atrocities.[64]

25. In addition to the literature, and the limited State practice referred to by Hannikainen, there was also some judicial practice referring to peremptory norms. The individual opinion of Judge Schücking in the *Oscar Chinn case* before the Permanent Court of International Justice in 1934 explicitly refers to *jus cogens*.[65] In his opinion, Judge Schücking determined a treaty to be invalid on account of its inconsistency with another rule of international law, found in the General Act of Berlin.[66] In his separate opinion, Judge Schücking admits that the "doctrine of international law in regard to questions of this kind is not very highly developed".[67] Nonetheless, he states, it is possible "to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void".[68] While this is non-derogation on the basis of a treaty, binding not universally but on participants to a prior treaty, it does reflect an openness to the idea of non-derogability.

26. *Jus cogens* was also invoked in an arbitral award under the French-Mexican Claims Commission, in the *Pablo Najera* case.[69] In that award, the Claims Commission interpreted Article 18 of the Covenant of the League of Nations — a provision requiring registration of treaties — as a rule having "le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens*)."[70] Of course, the Claims Commission held that the rule only applied as between members of the League of Nations and that it did not apply in relations between members and non-members.[71] This determination by the Claims Commission, while not based on the contemporary understanding of *jus cogens* norms, is important for its acceptance of the idea that there are, as a matter of principle, rules from which no derogation is permitted.

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[62] Verdross (n 30) at 572.

[63] See Alfred Verdross "*Jus Dispositivum* and Jus Cogens in International Law" (1966) 60 *American Journal of International Law* 55, at 55.

[64] Stephan (n 26), 1081. See also Frowein (n 30), at 1.

[65] Separate opinion of Judge Schücking in *The Oscar Chinn case*, Judgment of 12 December 1934, *Permanent Court of International Justice*, Ser. A/B No. 63, p. 65, at 148.

[66] Ibid.

[67] Ibid. at 148.

[68] Ibid.

[69] *Pablo Najera (France) v United Mexican States*, Decision No. 30-A of 19 October 1928, Vol V *UNRIAA* 466, at 470.

[70] Ibid. (Article 18 "has the character of a rule from which States, members of the League of Nations, were not free to derogate from".)

[71] Ibid. at 472.

27. While there was little practice to support the notion of non-derogable rules — and the practice that can be found related to non-derogation clauses in treaties and not typical *jus cogens* — the idea that there were some rules from which States could not contract out of, was largely accepted, at least in the literature, even before the Second World War. What may have been in dispute was the basis of the principle, but not the principle itself.

## B. Post-Second World War period prior to the adoption of the Vienna Convention on the Law of Treaties

28. In the period after the Second World War, the most significant development relating to *jus cogens* was the adoption of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention")[72] and the work of the Commission which led to it. Like Article 20 of the Covenant of the League of Nations, Article 103 of the Charter of the United Nations is also an example of a non-derogation provision.[73] As mentioned with respect to the Covenant, Article 103 is a treaty rule specifying priority, and not per se a norm *jus cogens*. Nonetheless, it too might be said to illustrate acceptance of hierarchy in international law. It was, however, the work of the Commission, together with the subsequent adoption of the Vienna Convention, that served to solidify the concept of *jus cogens* as part of the body of international law. It is important, therefore, to briefly describe the evolution of what eventually became article 53 of the Vienna Convention, through the debates within the Commission, the observations of States on the text of the Commission as well as the debates at the United Nations Conference on the Law of Treaties. While there are other provisions of the Convention on *jus cogens* — article 64 (emergence of new peremptory norms) and article 66, subparagraph (a) (disputes concerning the interpretation and application articles 53 and 64) — the focus for the purposes of this first conceptual report is on the text that became article 53, because it is that provision that provides a framework for the nature of *jus cogens* as presently understood.

29. It was in the third report of Sir Gerald Fitzmaurice — the eighth report on the law of treaties overall — that the term "*jus cogens*" first appeared.[74] In that report, Fitzmaurice proposed two provisions that invoked *jus cogens*. The text proposed by Fitzmaurice recognized that for a treaty to be valid "it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles of international law which are in the nature of *jus cogens*".[75] The text recognized that States may always, *inter se*, depart from rules of international law by means of an *inter se* agreement — *jus dispositivum*.[76] However, departure from such general rules of international law would be permissible only if the general rule in question was not one in the nature of *jus cogens*.[77] In explaining the rule, Fitzmaurice refers to the distinction between mandatory rules (*jus cogens)* and those

[72] United Nations, *Treaty Series*, vol. 1155, p. 331.
[73] Article 103 of the Charter provides that "obligations under the Charter shall prevail" over obligations "under any other international agreement".
[74] See Third Report on the Law of Treaties by Mr. GG Fitzmaurice, Special Rapporteur, A/CN. 4/115 and Corr. 1, under the title "legality of the object", *Yearbook...1958, Vol. II*, 26–27.
[75] Ibid., Art. 16(2), at 26.
[76] Ibid., Art. 17, at 27.
[77] Ibid.

rules "the variation or modification of which under an agreed regime is permissible" — the latter being *jus dispositivum*.[78] The commentary explains that, as a general rule, States can agree to modify generally applicable rules in their relations with each other.[79] It was, the commentary explained, "only as regards rules of international law having the kind of *absolute and non-rejectable character* (which admit of 'no option')" that the question of invalidity of a treaty arises.[80]

30. While Fitzmaurice's report mentioned *jus cogens*, the notion of the invalidity of a treaty on account of inconsistency with international law appeared earlier in the fourth report on the topic, namely in Sir Hersch Lauterpacht's first report.[81] The provision proposed by Lauterpacht declared that a treaty would be void if, firstly, its performance involves an "act which is illegal under international law" and secondly, if it is so declared by the International Court of Justice.[82] While, in his commentary, Lauterpacht echoes the sentiment that the principle as formulated "is generally, — if not universally — admitted", it is treated with great caution.[83] He addresses the invalidity of a treaty that violates the rights of a third party and concludes that the "the true reason for" the invalidity in such cases is that such treaties have, as an object, "an act which is illegal according to customary international law".[84] However, even where the treaty does not directly affect the interests of third States it may still be illegal.[85] For Lauterpacht, the basis of the illegality is that such treaties violate rules that have acquired "the complexion of a generally accepted — and, to that extent, customary — rules of international law".[86] To this extent, Lauterpacht's conception of an illegal treaty is one that is inconsistent with international law. Yet that might suggest that a treaty cannot depart from rules of customary international law. Such a proposition could not be supported in international law. To resolve this apparent contradiction, Lauterpacht explains that the test for illegality "is not inconsistency with customary international law *pure and simple*," but rather "inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public)*."[87]

31. Following on Fitzmaurice, Sir Humphrey Waldock, the last Special Rapporteur for the Commission's work on the law of treaties, similarly proposed text on the illegality of a treaty because of inconsistency with norms of *jus cogens*.[88] In the respective draft article, Sir Humphrey Waldock proposed that a treaty "is contrary to international law and void if its object and its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*".[89] In the commentary to the provision, he notes that while the concept of *jus*

[78] Ibid., Para. 76 of the Commentary, at 40.
[79] Ibid.
[80] Ibid. (emphasis added).
[81] Report on the Law of Treaties by Mr. H Lauterpacht, Special Rapporteur, A/CN.4/63, *Yearbook... 1953, vol. II.*
[82] Ibid., Article 15, at 154.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid. at 155.
[87] Ibid.
[88] Second Report on the Law of Treaties, by Mr. Sir Humphrey Waldock, Special Rapporteur, A/CN.4/156 and Add 1-3, *Yearbook... 1963, vol. II*, at 36.
[89] Ibid., Art. 13, at 52.

*cogens* is controversial,[90] the "view that in the last analysis there is no international public order — no rule from which States cannot at their own free will contract out — has become increasingly difficult to sustain".[91] Nonetheless, he cautions that rules having the character of *jus cogens* are the exception rather than the rule.[92]

32. The idea that a treaty is void if it is inconsistent with fundamental rules of international law was generally welcomed within and beyond the Commission.[93] Members of the Commission felt that the principle of invalidity of a treaty on account of inconsistency with *jus cogens* was important.[94] While there were differences of opinion concerning the drafting and the legal and theoretical basis, the basic proposition itself was not questioned.[95] In 1966, expressing satisfaction at the approval of Governments to the Commission's texts, Mr. Yasseen noted that the "concept of *jus cogens* in international law was unchallengeable and ... [n]o specialist in international law could contest the proposition that no two States could come to an agreement to institute slavery or to permit piracy, or that any formal agreement for either purpose was other than void".[96] As a result, in its commentary to the version of the text that eventually became article 50 of the draft articles on the law of treaties,[97] the Commission stated that "in *codifying* the law of treaties it must take *the position that today* there are certain rules and principles from which States are not competent to derogate by a treaty arrangement".[98] Similarly, in the

[90] Ibid., para. 1 of Commentary to Art. 13, at 52.

[91] Ibid.

[92] Ibid., para. 2 of Commentary to Article 13, at 53 ("Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty").

[93] See, e.g. Alexidze (n 30), at 230.

[94] See, e.g., Summary Record of the 682nd Meeting, *Yearbook... 1963*, para. 18, at 54, where Mr. Rosenne stated that the principle was, from a political and moral standpoint, "of capital importance". See also, Summary Record of the 683rd Meeting, para. 37, at 63 where Mr. Yasseen stated that the principle "was as important as it was sensitive"; para. 44, at 63, Mr. Tabibi opining that no "State could ignore certain rules of international law"; para. 64, at 65, where Mr. Pal stated that "there could be no doubt that an international public order existed now and that certain principles of international law had the character of *jus cogens*"; summary record of the 684th meeting, para. 6, at 68, where Mr. Lachs observed that the concept of *jus cogens* "was a vital one for contemporary international law".

[95] See, e.g. ibid., Summary Record of the 683rd Meeting, para. 29, at 61, where Mr. Briggs questioned the use of the term "*jus cogens*" and went on to propose that the text of draft article 13 be redrafted as: "A treaty is void if its object is in conflict with a peremptory norm of general international law from which no derogation is permitted except by a subsequently accepted norm of general international law". Similarly, Mr. Amado suggested that a reference to "a fundamental rule of law" might be more appropriate (summary record of the 684th meeting, para. 16, at 68). On the question of the philosophical basis, see Mr. de Luna, summary record of the 684th meeting, para. 58 *et seq*, at 71. See also, Summary Record of the 685th Meeting, para. 19, where Mr. de Luna, having listened to the debates concerning the philosophical basis of *jus cogens*, makes the following observations: "It was generally acknowledged that *jus cogens* formed part of positive law; there was disagreement over the content of positive law which was the source of the difficulty. If the term 'positive law' was understood to mean rules laid down by States, then *jus cogens* was by definition not positive law. But if 'positive law' was understood to mean the rules in force in the practice of the international community, then *jus cogens* was indeed positive law." See also Evan Criddle and Evan Fox-Decent "A Fiduciary Theory of Jus Cogens" (2009) 34 *The Yale Journal of International Law* 331, at 337.

[96] Summary Record of the 828th Meeting, *Yearbook... 1966*, vol. I (Part I), para. 26, at p. 38.

[97] See para. 1 of the commentary to draft article 37 of the draft articles on the law of treaties provisionally adopted by the Commission, in *Yearbook... 1963*, vol. II, para. 17, at 189.

[98] Ibid., para. 1 of commentary to draft article 37 of the draft articles on the law of treaties. (Emphasis added).

commentary to draft article 50, the Commission stated that the view that there "is no rule from which States cannot at their own free will contract out has become increasingly difficult to sustain".[99] The Commission, thus clearly sought to show that the text it was putting forward was not *lex ferenda* but *lex lata*.

33. The view of the Commission, that international law as it stood at the time of the adoption of the draft articles on the law of treaties recognized the existence of general rules of international law from which no derogation was permitted, was widely shared by States both during the work of the Commission and at the Vienna Conference. In its comments to the Commission, for example, the Netherlands "endorsed the principle" underlying the provision.[100] Similarly, Portugal considered that the position adopted by the Commission was a "balanced one".[101] While it is impossible to reproduce all the comments expressing support, it is safe to say that almost all States expressed support.

34. While the comments of States were generally supportive, there were some States that expressed reservations. However, with the exception of one State, none expressed objection to the provision.[102] The United Kingdom, for example, while not objecting to the idea of illegality on account of inconsistency with a peremptory rule, cautioned that "its application must be very limited".[103] Iraq, for its part, noted that the difficulties of transposing the hierarchy of law from domestic law to international law, where, it noted, whether "a rule is conventional or customary does not determine its value".[104] Nonetheless, Iraq submitted that while great caution must be taken, "the notion of *jus cogens* is indisputable" in international law.[105]

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[99] Para. (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook... 1966, Vol II*, 187 at 247. The same paragraph of the commentary also states as follows: "in codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character."

[100] See Fifth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/183 and Add 1-4, *Yearbook... 1966*, vol II, p.1, at p. 21.

[101] Ibid. See also, as examples, the views of the United States, at p. 21 ("the concept embodied in this article would, if properly applied, substantially further the rule of law in international relations"); Algeria, at p. 21 ("[t]he Algerian delegation endorses the approach of the Commission to the question of *jus cogens*"); Brazil, at p.21 ("whatever doctrinal divergencies there may be, the evolution of international society since the Second World War shows that it is essential to recognize the peremptory nature of certain rules"); Czechoslovakia, at p. 22, ("that provision is largely supported by State practice and international law and is endorsed by many authorities"); Ecuador, at p. 22 ("endorses the initiative of the Commission in including a violation of *jus cogens* as a ground for invalidating a treaty"); France, at p. 22 ("is one of the genuinely key provisions of the draft articles"); Ghana, at p. 22 ("endorses the Commission's approach to the concept of *jus cogens*"); and the Philippines, at p. 22 ("welcomes the Commission's decision to recognize the existence of peremptory norms of international law").

[102] See para. (1) of the commentary to draft article 50 (n 99) ("[m]oreover, if some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of to-day").

[103] *Yearbook... 1966, vol II*, p. 22.

[104] Ibid.

[105] Ibid.

Only one State, Luxembourg, expressed disapproval of the provision.[106] Luxembourg took the view that the provision was likely to create confusion.[107] It stated that it interprets the provision as being designed to "introduce as a cause of nullity criteria of morality and 'public policy' such as are used in internal law" and it questioned "whether such concepts are suitable for transfer to international relations which are characterized by the lack of any authority, political or judicial, capable of imposing on all States standards of international justice and morality".[108] Other than Luxembourg, no other State questioned the basic proposition of the Commission that international law, as it stood at the time, provided for the nullity of treaties that were incompatible with some fundamental norms. On the basis of the overwhelming support for the position, the Commission adopted draft article 50, which provided as follows:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

35. Draft article 50 of the Commission's text is the precursor of what is now article 53 of the Vienna Convention. The pattern of support for the principle behind draft article 50 can be observed in the negotiating history of what became article 53 of the Vienna Convention. The Soviet Union, for example, stated that "treaties that conflicted with [*jus cogens*] must be regarded as void *ab initio*", noting that this notion was recognized, not only by the Commission, but also by "eminent jurists".[109] Similarly, Mexico stated that the "character of [*jus cogens*] was beyond doubt",[110] while Israel stated that "the very notion of *jus cogens* was an accepted element of contemporary positive international law".[111]

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[106] Ibid. at p. 21 See *contra* Grigory Tunkin "*Jus Cogens* in Contemporary International Law" (1971) 3 *University of Toledo Law Review* 107, at 112 ("However, the comments by the Governments of the United States, United Kingdom, France and some other countries ... indicated that these governments were actually against the article on *jus cogens*").

[107] *Yearbook... 1966, vol II*, at p. 21.

[108] Ibid.

[109] Mr. Khlestov (Soviet Union), *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Fifty-second Meeting, 4 May 1968, para. 3.

[110] Mr. Suarez (Mexico), ibid., paras 6-8. See also Mr. Castrén (Finland), ibid., para. 11 ('article 50 correctly stated an important principle, which must be retained in the draft'); Mr. Yasseen (Iraq), ibid., para. 21 ("the contents of article 50 were an essential element in any convention on the law of treaties. The article expressed a reality by setting forth the consequences in the realm of treaty law of the existence of rules of *jus cogens*. The existence of such rules was beyond dispute. No jurist would deny that a treaty which violated such rules as prohibition of the slave-trade was null and void"); Mr. Mwendwa (Kenya), ibid., para. 28 ("by including in the draft a provision on *jus cogens*, the International Law Commission had at one and the same time recognized a clearly existing fact and made a positive contribution to the codification and progressive development of international law"); Mr. Fattal (Lebanon), ibid., para. 42 ("almost all jurists and almost all States were agreed in recognizing the existence of a number of fundamental norms of international law from which no derogation was permitted, and on which the organization of international society was based"); Mr. Ogundere (Nigeria), ibid., para. 48 ("[i]nternational morality had become accepted as a vital element of international law, and eminent jurists had affirmed the principle of the existence of *jus cogens*, based on the universal recognition of an enduring international public policy deriving from the principle of a peremptory norm of general international law"); Mr. Ruiz Varela (Colombia), ibid., Fifty-third Meeting, para. 26 ("in principle the entire world recognized the existence of a public international order consisting of rules from which States

36. There were, however, some States which, though supportive of the text, expressed, or implied, some doubt about whether it was part of *lex lata*.[112] On the whole, however, States at the Vienna Conference accepted the idea of *jus cogens* as part of international law and the discussions pertained more to the basis of *jus cogens* and deliberations on drafting suggestions. As Czechoslovakia observed, the disagreement over article 50 of the Commission's draft articles on the law of treaties pertained to "how *jus cogens* could be defined so as to protect the stability of contractual relations".[113] The majority of amendments proposed to the draft article, and as a consequence significant portion of the deliberation, centred around substantive and procedural rules for identifying rules of *jus cogens*. France, for example, which has often been seen as the main opponent of *jus cogens* at the Vienna Conference did not oppose the principle but rather insisted on clarity.[114] In unequivocal support for the notion of *jus cogens*, France declared at the Vienna Conference that "the substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person".[115] French concerns with the Commission's draft article 50, which were shared by some other delegations, centred on the criteria for identifying these rules to avoid abuse of *jus cogens* through unilateral invocation.[116] The

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could not derogate"); Mr. Nahlik (Poland), ibid., para. 32 ("[t]he hierarchy of rules of international law ... was a logical outcome of the modern development of international law [and] could no longer be doubted"); Mr. Jacovides, (Cyprus), ibid., para. 68, ("[i]n recognizing the existence of a corresponding rule in public international law the International Law Commission had made a very great contribution both to the codification and to the progressive development of international law."); Mr. de le Guardia (Argentina), ibid., Fifty-fourth Meeting, para. 22 ("the existence of *jus cogens* was disputed by writers. Nevertheless, he was prepared to admit that a general international law from which States could not derogate did in fact exist; to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality."); Mr. de Castro (Spain), ibid., Fifty-fifth Meeting, para. 1 ("the existence of peremptory rules of international law might seem so obvious that even to mention them would be superfluous. But the International Law Commission had been right to include article 50 in the draft convention, in view of the insistence of a minority on either denying the existence of *jus cogens* altogether, or severely restricting its scope."); Mr. Fleischhauer (Germany), ibid., para. 31 ("only a few speakers had denied the existence of certain rules of *jus cogens* in international law and said that his delegation was equally of the opinion that such rules existed in international law.")

[111] Mr. Rosenne (Israel), ibid., Fifty-fourth Meeting, para. 36.

[112] Mr. Alvarez Tabio (Cuba), ibid., Fifty-second Meeting, para. 34 ("article 50 represented an important contribution to the progressive development of international law and his delegation strongly supported it."); Mr. Fattal (Lebanon), ibid., Fifty-second Meeting, para. 42 ("[i]n spite of ideological difficulties, a shared philosophy of values was now emerging"); Mr. Ratsimbazafy (Madagascar), ibid., Fifty-third Meeting, para. 21 ("once the notion was established and recognized as such, it would become increasingly important in the law and life of the international community").

[113] Mr. Smejkal (Czechoslovakia), ibid., Fifty-fifth Meeting, para. 24.

[114] Mr. de Bresson (France), ibid., Fifty-fourth Meeting, para. 27 (France "could hardly formulate an objection to such [*jus cogens*]").

[115] Ibid., para. 32.

[116] Ibid., para. 28 ("[t]he problem, which was on the ill-defined borderline between morality and law, was that of knowing which principles it was proposed to recognize as having such serious effects as to render international agreements void, irrespective of the will of the States which had concluded them"); para. 29 ("[t]he article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*, on the content of which divergent, even conflicting interpretations had been advanced during the discussion...Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise

concerns of the United States are equally instructive in this regard. The United States "accepted the principle of *jus cogens* and its inclusion in the convention".[117] In its view, however, "a State could not seek release from a treaty by suddenly adopting a unilateral idea of *jus cogens* in its international rules, and could not pretend to assert against other States its own opinion of the higher morality embodied in *jus cogens*".[118] It, like France, had therefore proposed an amendment to more explicitly provide for the criteria to identify *jus cogens* norms. The United Kingdom, similarly, did "not dispute that international law now contained certain peremptory norms, in the sense in which that term was used in article 50".[119] Nonetheless, it "viewed with concern the uncertainty to which article 50 would give rise, in the absence of a sufficiently clear indication of the means of identifying the peremptory norms in question".[120] Thus, while there was certainly a great deal of debate and some concern expressed the *jus cogens* provision, this concerned more the detail and application of the rule embodied in text rather than the rule itself. To address the concerns of uncertainty raised by some States, the Vienna Conference adopted article 66, subparagraph (a), which permits a party to a dispute involving the interpretation or application of a *jus cogens*-related provision in the Vienna Convention, to "submit [the dispute] to the International Court of Justice for a decision".

37. There were, however, a handful of States at the Vienna Conference that expressed reservations about the principle of *jus cogens* itself. At the time, the position of Turkey was that the notion of *jus cogens* and the manner it had been articulated in the Commission's draft articles "were entirely new".[121] In its view, draft article 50 was concerned "not with a well-established rule, but with a new rule by means of which an attempt was being made to introduce into international law,

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notion"). See also Mr. Rey (Monaco), ibid., Fifty-sixth Meeting, para. 32 ("Monaco welcomed the introduction of *jus cogens* into positive international law, but was anxious about the use that might be made of it."); Mr. Dons (Norway), ibid., Fifty-sixth Meeting, para. 37, ("[t]he article gave no guidance on some important questions, namely, what were the existing rules of *jus cogens* and how did such rules come into being? The Commission's text stated the effects of those rules but did not define them, so that serious disputes might arise between States; and it provided no effective means of settling such disputes. Consequently, it would seriously impair the stability and security of international treaty relations"); Mr. Evrigenis (Greece), ibid., Fifty-second Meeting, para. 18 ("[t]here was universal recognition of the existence of a *jus cogens* corresponding to a given stage in the development of international law, but there were still some doubts about its content"); See, however, Mr. Bolintineanu (Romania), ibid., Fifty-fourth Meeting, para. 58 ("did not consider that there was any sound basis for the argument that it would be difficult to establish objectively the content of *jus cogens* and that there was a risk that that content would be determined arbitrarily by each State") and Mr. Koutikov (Bulgaria), ibid., para. 70 ("was surprised that other delegations had hesitated to accept the principle stated in article 50 purely because its scope could not yet be defined. No major principle governing international life had ever before had to wait until all its possible practical applications had been catalogued in detail before it was proclaimed a principle"). Similarly, Mr. Fattal (Lebanon) (n 112), para. 45, responding to the fears of abuse stated that it "was nothing new; any norm of international law could be used for such a pretext".

[117] Mr. Sweeney (United States), ibid., Fifty-second Meeting, para. 16.

[118] Ibid., para. 15.

[119] Mr. Sinclair (the United Kingdom), ibid., Fifty-third Meeting, para. 53.

[120] Ibid. See also Mr. Fujisaki (Japan), ibid., Fifty-fifth Meeting, para. 30 ("[h]is delegation firmly believed that no State should be entitled to have recourse to article 50 without accepting the compulsory jurisdiction of the Court").

[121] Mr. Miras (Turkey), ibid., Fifty-third Meeting, para. 1.

through a treaty, the notion of 'public policy' — *ordre public*."[122] For this reason, Turkey stated that it could not support the inclusion of the provision.[123] Similarly, Australia, having pointed to the lack of practice on *jus cogens*, declared that in "the absence of any comprehensive list or any clear definition, even by illustration, of what norms of general international law would have the character of *jus cogens*, the Australian Government concluded that it would be wrong to include the article in the present terms, in a convention on the law of treaties".[124]

38. It should be clear from the above that, at the time of the adoption of the Vienna Convention, both members of the Commission and States, with few exceptions, generally accepted the idea of *jus cogens*. Moreover, writers at the time also generally accepted that there were some rules of general international law that States could not contract out of. McNair, for example, writing five years before the adoption of the Commission's draft articles on the law of treaties, observed that it was "difficult to imagine a society ... whose law sets no limits whatever to freedom of contract".[125] The same is true, he continued, of international law, even "though judicial and arbitral sources do not furnish much guidance upon the application of these principles".[126]

39. In addition, there were instances, even before the adoption of the Commission's draft articles or the Vienna Convention, when States invoked the potency of *jus cogens*. In 1964, for example, Cyprus contested, on the basis of the notion of peremptory norms, the validity of the Treaty of Guarantee between Cyprus, the United Kingdom, Greece and Turkey of 1960.[127] Furthermore, while the International Court of Justice had not, in this period, applied *jus cogens*, it was clearly a concept within its radar. The Court itself, without ruling on *jus cogens*, referred to it in the *North Sea Continental Shelf Cases*.[128] The concept of *jus cogens* has, moreover, been explicitly invoked in individual opinions of the judges of the International Court of Justice. Judge Fernandez, for example, declared, as an exception to the *lex specialis* rule, that "several rules *cogente* prevail over any special rules".[129] Judge Tanaka declared in his dissenting opinion in the *South West Africa Cases (Second Phase)*, that "the law concerning the protection of human rights may be considered to belong to the *jus cogens*".[130] There is even evidence of

[122] Ibid., para. 6.
[123] Ibid.
[124] Mr. Harry, ibid., Fifty-fifth Meeting, para. 13.
[125] McNair *Law of Treaties* (Oxford University Press, 1961), at 213 *et seq.*
[126] Ibid. at 214.
[127] Hannikainen (n 25), at 148. For a full discussion see Jacovides (n 39), especially at 39 *et seq.*
[128] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands)*, Judgment of 20 February 1969, *ICJ Reports* 1969, p. 3, para. 72 ("[w]ithout attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties").
[129] *Case Concerning Right of Passage over Indian Territories (Portugal v India) Merits*, Judgment of 12 April 1960, *ICJ Reports* 1960, p. 6, Dissenting opinion of Judge ad hoc Fernandez, at para. 29.
[130] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase*, Judgment of 18 July 1966, *ICJ Reports* 1966, p. 6, Dissenting opinion of Judge Tanaka, at p. 298. See also *North Sea Continental Shelf Cases* (n 118), dissenting opinion of Judge Tanaka, at p. 182 declaring that reservations in conflict with a principle of *jus cogens* would be null and void; and see further separate opinion of Judge Moreno Quintana in *Case Concerning the Application of the Convention of 1902 Governing Guardianship of Infants (Netherlands v Sweden)*, Judgment of 28 November 1958, *ICJ Reports* 1958, p. 55, at pp. 106-107 recognizing a number of rules as having "a peremptory character and a universal scope".

*jus cogens* being invoked in domestic courts in the period leading up to the adoption of the Vienna Convention.[131]

40. After extensive deliberations showing general support for the idea of peremptory norms, the Vienna Conference adopted a slightly modified version of the Commission's text as article 53:[132]

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

41. This brief historical analysis illustrates that, at least up to the adoption of the Vienna Convention in 1969, the idea of peremptory rules of international law had been part of international law. States that questioned its inclusion in the Vienna Convention did so not out of belief that peremptory norms were not part of international law, but rather out of concern for the lack of clarity about the particular norms that had achieved the status of *jus cogens*. As described in paragraph 36 above, that particular problem was addressed by the inclusion of a dispute settlement provision permitting recourse to the International Court of Justice in the event of a dispute concerning *jus cogens*. It has survived the various phases of the development of international law and withstood different philosophical conceptions advanced to explain the basis of international law and its binding character. The historical analysis also shows, however, that the content and criteria for peremptory rules have, particularly during the codification phase that led to the adoption of the Vienna Convention, been elusive.

## V. Legal nature of *jus cogens*

42. While the idea of *jus cogens* as part of international law, that is, *lex lata*, is not seriously questioned,[133] the criteria for its identification and its content have been the subject of disagreement. The differences of view as to the criteria for the identification of norms of *jus cogens* and some of the norms that constitute *jus cogens* have largely flowed from a philosophical difference on the foundations of *jus cogens* and differing interpretations about its content. A number of foundational bases, ranging from natural law doctrine to positivism, have been advanced to explain *jus cogens*. While it is not the objective of either the present report or the consideration of the topic, to resolve the theoretical debates concerning *jus cogens*, any attempt to distil criteria for its identification — and indeed its consequences — must be based on the appreciation of the theoretical debate surrounding its foundations. The debates,

[131] See, e.g., *Beschluß des Zweiten Senats*, 7 April 1965, BVerfGE, 18, 441 (449), where the German Constitutional Court upheld a treaty, inter alia, because a rule relied upon to impugn a provision "würde nicht zu den zwingeden Regeln des Völkerrechts gehören" ("would not belong to mandatory rules of international law").

[132] The Commission also included article 64 (on the emergence of a new peremptory norm of general international law) and article 71 (consequences of the invalidity of a treaty which conflicts with peremptory norm of general international law).

[133] Pavel Šturma, "Human Rights as an Example of Peremptory Norms of General International Law", in Pavel Šturma, Narcisco Leandro Xavier Baez (Eds.) *International and Internal Mechanisms of Fundamental Rights Effectiveness* (Bayern, 2015), at 12.

therefore, cannot be avoided. Moreover, even if not providing "the solution" to theoretical debate, the work of the Commission must be based on a sound and practical understanding of the nature of *jus cogens*, which necessitates a study of some of the theoretical bases that have been advanced. It is against such background that the present section surveys the theoretical debate concerning *jus cogens*.

43. The legal nature of *jus cogens* involves more than the theoretical or philosophical underpinnings of the concept. It concerns, in addition, the role of *jus cogens* beyond the Vienna Convention, which has already been recognized by the Commission.[134] While *jus cogens* is generally accepted as part of international law, there remain those who doubt its position in positive international law.[135] A brief commentary on its position in international law, taking into account developments since the adoption of the Vienna Convention is therefore called for.

## A. Place of *jus cogens* in international law

44. The criticisms and objections against *jus cogens* have been considered in various publications.[136] While, as has been noted, the number of those questioning the notion is fast diminishing,[137] it is still necessary to make clear that *jus cogens* is firmly established as part of current international law. The arguments advanced for showing that it is not — and in some instances should not be — part of international law vary. Orakhelashvili, for example, identifies lack of practice,[138] and fear for the sanctity of treaties and incompatibility with *pacta sunt servanda* as arguments that have been advanced against *jus cogens*.[139] Similarly, Kolb identifies, as objections to *jus cogens*, the critique that the idea of *jus cogens* is simply not compatible with

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[134] See, e.g., Arts. 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts, General Assembly resolution 56/83 of 12 December 2001, annex; commentary to draft guidelines 3.1.5.4 and 4.4.3 of the Guide to Practice on Reservations to Treaties, *Official Records of the General Assembly, Sixty-Sixth Session, Supplement No. 10* (A/66/10/Add.1); para. 374 of *Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682, and Conclusion 33 of the *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *Yearbook...2006*, vol. II (Part Two), para. 251.

[135] See, e.g. Michael Glennon, "De l'absurdité du Droit Imperatif (*Jus Cogens)*" (2006) 11 *Revue Générale de Droit International Public* 529; Arthur M Weisburd "The Emptiness of the Concept of *Jus Cogens* as Illustrated by the War in Bosnia-Herzegovina" (1995) 17 *Michigan Journal of International Law* 1; Gordon Christenson "Jus Cogens: Guarding Interests Fundamental to International Society" (1988) 28 *Virginia Journal of International Law* 585. Robert Barnidge "Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order" (2008) 38 *Israel Yearbook of Human Rights* 199. See also dissenting opinion of Judge ad hoc Sur in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012, p. 422, para. 4 ("let us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute, as will be seen. The purpose of this *obiter dictum* is to acknowledge and give legal weight to a disputed notion, whose substance has yet to be established.").

[136] See, e.g. Kolb (n 27), 15-29. See also Alexander Orakhelashvili *Peremptory Norms in International Law* (2006), 32-35.

[137] Ulf Linderfalk "The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?" (2008) 18 *European Journal of International Law* 853, at 855.

[138] Orakhelashvili (n 136), at 32, citing Guggenheim.

[139] Ibid., citing Schwarzenberger.

the nature and structure of international law,[140] that *jus cogens* is not recognized in the international legal order,[141] that, as a practical matter, *jus cogens* is without any real effect[142] and that *jus cogens* may undermine the foundations of the international legal order.[143]

45. It is not necessary to advance theoretical assertions in response to the various criticisms, which in any event have been ably addressed elsewhere.[144] What is important for the purposes of the Commission's work is whether *jus cogens* finds support in the practice of States and jurisprudence of international and national courts — the currency of the Commission's work.[145] While the views expressed in literature help to make sense of the practice and, may provide a framework for its systematization, it is State and judicial practice that should guide us. As described in the previous section, the widespread belief of States was that *jus cogens* formed part of international law at the time of the adoption of the Vienna Convention.

46. Since the adoption of the Vienna Convention, probably because of its adoption, references to *jus cogens* by States and in judicial decisions have increased manifold. The explicit references to *jus cogens* in the judicial practice of the International Court of Justice alone have been telling. Since the adoption in 1969 of the Vienna Convention, there have been 11 explicit references to *jus cogens* in majority judgments or orders of the International Court of Justice, all of which have assumed (or at least appear to assume) the existence of *jus cogens* as part of modern

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[140] See Kolb (n 27), at 15-22. Kolb in fact identifies several critiques which all appear to be a variation of the incompatibility critique. They are as follows: first, the idea of *jus cogens* presupposes a "a superior authority entrusted with the task of enforcing those norms", which is not the case in international law (16-18); second, that *jus cogens* presupposes that there is a distinction between "general legislature" and the "subjects" of international law, which is not the case in international law since the law-makers, States, are also the subjects of international law (18-21); the idea of *jus cogens* presupposes a hierarchy of norms, and international law is yet too underdeveloped to have such a hierarchy of norms (21-22).

[141] Ibid. at 23.

[142] Ibid. at 23-24.

[143] Ibid. at 25-27. Kolb notes that there are various strands to this critique of *jus cogens*, including that it "carries with it the danger that some elites, with their own hidden agendas, pretend to speak out for the international community (thereby hiding their interests behind lofty words) and impose their own vision of a suitable ideology under the lenitive and permissive guise of peremptory norms." See also statement by South Africa, A/C.6/66/SR/13, para. 7, ("some legal commentators had pointed out [that] the concepts of *jus cogens* and of obligations *erga omnes*, which were central to the principle of universal jurisdiction, in practice were often used as instruments in hegemonic struggles.") *Cf.* Tomuschat (n 50), at 20, suggesting that "powerful States have never been friends of *jus cogens*. They realize that the consequences of *jus cogens* may lead to a shift in the power balance in favour of the international judiciary ... ." Interestingly, in formulating its objections to the formulation of the Commission's text on *jus cogens*, France suggested that the lack of clarity would be to the detriment of the "weaker" States. See statement by Mr. de Bresson (France), *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, A/CONF.39/11, Fifty-fourth Meeting, para. 28.

[144] See Kolb (n 27), at 15 *et seq.* and Orakhaleshvili (n 136), at 32 *et seq.*

[145] See statement by the United States (n 7) at para. 20 (given the relative paucity of case law on the subject, he urged the Commission to focus on treaty practice, notably under the rules of the Vienna Convention, and on other State practice that illuminates the nature and content of *jus cogens*, the criteria for its formation and the consequences flowing therefrom. Only research and analysis grounded in the views expressed by States was likely to add value).

international law.[146] In the *Military and Paramilitary Activities* case, for example, the Court, without explicitly endorsing the idea of *jus cogens*, stated that both States and the Commission viewed the prohibition on the use of force as *jus cogens*.[147] To the extent that there is ambivalence in the Court's statement about *jus cogens*, it appears more directed at whether the prohibition qualifies as *jus cogens* rather than at the idea of *jus cogens* itself.[148] The advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provides yet another example of the Court's acceptance of *jus cogens* without deciding on it.[149] Although the Court states that there is "no need for the Court to pronounce on this matter", this is explicitly because, in the Court's assessment, the question before it did not call for answering "the question of the character of the humanitarian law which would apply to the use of nuclear weapons".[150] But the Court, in explicitly expounding on the character of *jus cogens*, appears to accept it as part of international law.[151] The Court was much more unequivocal in its acceptance of *jus cogens* as part of current international law in the *Case Concerning Armed Activities on the Territory of the Congo*, where the Court not only refers to *jus cogens*, but identifies the prohibition of genocide as "assuredly" having the character of *jus cogens*.[152]

47. In addition to express mentions in the majority decisions or opinions of the International Court of Justice, there have been, in total, 78 express mentions of *jus cogens* in individual opinions of the members of the Court.[153] It has also been

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[146] For recent references by the Court to *jus cogens* see the following cases: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, *ICJ Reports* 2007, p. 43, para. 147-184; *Accordance with International Law of The Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, *ICJ Reports* 2010, p. 403; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, *ICJ Reports* 2012, p. 99, at para. 92 *et seq*; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012, p. 422, para. 99-100; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, ICJ Judgment of 3 February 2015, para. 87.

[147] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States)*, *ICJ Reports* 1986, p. 14, para. 190 (*jus cogens* "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law …[and] the International Law Commission in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition on the use of force in itself constitutes a conspicuous example of a rule having the character of jus cogens'").

[148] *Cf.* James Green "Questioning the Peremptory Status of the Prohibition of the Use of Force" (2011) *Michigan Journal of International Law* 215, at 223 ("[i]t is the view of the present author that the Court concluded here that the prohibition of the use of the force was a peremptory norm, although it must be said that others have a different interpretation of this passage.").

[149] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, 226.

[150] Ibid.

[151] Ibid. ("[t]he question whether a norm is part of *jus cogens* relates to the character of the norm").

[152] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda)*, Judgment of 3 February 2006, *ICJ Reports* 2006, p. 6, para. 64.

[153] Examples of individual opinions since the adoption of Vienna Convention include, separate opinion of Judge Ammoun in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium V. Spain) Second Phase*, Judgment of 5 February 1970, *ICJ Reports* 1970, p. 3, at 304 ("[t]hus, through an already lengthy practice of the United Nations, the concept of *jus cogens* obtains a greater degree of effectiveness, by

explicitly recognized in the jurisprudence of other international courts and tribunals.[154] In *Kayishema*, for example, the International Criminal Tribunal for Rwanda stated that "the [prohibition of the] crime of genocide is considered part of international customary law, and moreover, a norm of *jus cogens*".[155] Similarly in *Nyiramasuhuko*, the Appeals Chamber of the Tribunal noted that the discretion of the Security Council in defining crimes against humanity was "subject to respect for peremptory norms of international law (*jus cogens*)".[156] *Jus cogens* also finds expression in decisions of domestic courts.[157] In *Yousuf v Samantar*, for example, the United States Court of Appeal stated that "as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign".[158] Similarly, the High Court of Kenya, in *Kenya Section of the International Commission of Jurists v Attorney General* held that "the duty to prosecute international crimes has developed into *jus-cogens* and customary international law".[159] The South African Constitutional Court, for its part, noted that a 'state's duty to prevent impunity ... is particularly pronounced with respect to

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ratifying, as an imperative norm of international law, the principles appearing in the preamble to the Charter"); Separate opinion of Vice-President Ammoun in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *ICJ Reports* 1971, p. 16, at 77 *et seq* ("..rightly viewed the act of using force with the object of frustrating the right of self- determination as an act of aggression, which is all the more grave in that the right of self-determination is a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances."); Dissenting opinion of Judge Schwebel in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Jurisdiction of the Court and Admissibility of the Application*, Judgment of 26 November 1984, *ICJ Reports* 1984, p. 392, para. 88 ("[w]hile there is little agreement on the scope of *jus cogens*, it is important to recall that in the International Law Commission and at the Vienna Conference on the Law of Treaties there was general agreement that, if *jus cogens* has any agreed core, it is Article 2, paragraph 4."); Separate opinion of Judge Lauterpacht in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) Further Requests for the Indication of Provisional Measures*, Order of 13 September 1993, *ICJ Reports* 1993, p. 325, para. 100 ("[t]his is because the prohibition of genocide... has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*."); Separate opinion of Judge Ranjeva in *Case Concerning East Timor (Portugal v Australia)*, Judgment of 30 June 1995, *ICJ Reports* 1995, p. 90, at 45 ("the *jus cogens* falls within the province of positive law"); and Dissenting opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-Claim, Order of 6 July 2010, *ICJ Reports* 2010, p. 310 at ("The basic principle of equality before the law and non-discrimination permeates the whole operation of State power, having nowadays entered the domain of *jus cogens*.").

[154] See, e.g., *Prosecutor v. Furundžija* (IT-95-17/1), 10 December 1998 (ICTY) and *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, UNRIAA, vol. XX, p. 119.

[155] *Prosecutor v Kayishema et al* (ICTR-95-1), Trial Judgement, 21 May 1999 (ICTR), para. 88.

[156] *Prosecutor v Nyiramasuhuko* (ICTR-98-42), Appeals Judgement, 14 December 2015, para. 2136.

[157] See, famously, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, House of Lords, [2000] 1 AC p. 147.

[158] *Yousuf v. Samantar*, Judgement of 2 November 2012 of the United States Court of Appeal, 699 F.3d 763, 776–77 (4th Cir. 2012), at 19). See also *Farhan Mahamoud Tani Warfaav Yusuf Abdi Ali*, Judgment of 1 February 2016 of the United States Court of Appeals for the Fourth Circuit, No 14-1880, at 18 declining to overturn the holding in *Samantar*.

[159] *Kenya Section of the International Commission of Jurists v Attorney General & Another*, Judgement of 28 November 2011 of the High Court of Kenya, [2011] *E-Kenyan Law Reports* at 14.

those norms, such as the prohibition on torture, that are widely considered peremptory and therefore non-derogable".[160] The idea of peremptory norms in international law is also reflected in regional judicial and quasi-judical practice.[161] In the *Case of Expelled Dominicans and Haitians*, the Inter-American Court of Human Rights stated that "the principle of equal and effective protection of the law and non-discrimination" were *jus cogens*.[162]

48. States too have routinely relied on *jus cogens* or peremptory norms in a variety of forums. Over and above statements specifically on the Commission's work on the law of treaties, there have been many statements before, for example, the General Assembly, in particular the Sixth Committee.[163] Similarly, States have also routinely appealed to *jus cogens* in their statements before the Security Council.[164] Statements

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[160] *National Commissioner of the South African Police Service v the Southern African Human Rights Litigation Centre and Others*, Judgment of 30 October 2014 of the South African Constitutional Court, 2014 (12) *BCLR* 1428 (CC) at para. 4. See also *East German Expropriation case: Mr. van der M*, judgment of 26 October 2004 of the German Constitutional Court, *B v R 955/00 ILDC 66 (DE)*, para. 97 ("the Basic Law adopts the gradual recognition of the existence of mandatory provisions ... not open to discussion by States (*jus cogens)*"); *Prefecture of Voiotia v Federal Republic of Germany*, Judgement of 4 May 2000 of the Hellenic Supreme Court, Case No 11/2000, holding that crimes committed by the SS unit against civilian populations of a Greek village violated *jus cogens* norms. See further *Ferrini v Republica Federale di Germania*, Judgement of 11 March 2004 of the Italian Corte di Cassazione, Case no. 5044, where the Court accepted that deportation and forced labour are international crimes belonging to *jus cogens*.

[161] See for example, *Al-Adsani v. UK* (Application No. 35763/97), Judgment of 21 November 2001 of the European Court of Human Rights; see also *Stichting Mothers of Srebrenica and Others v. Netherlands*, App No. 65542/12 (ECHR 2013), Judgment of 11 June 2013 of the European Court of Human Rights, para.4.3.9; ("Regarding the right to nationality, the court reiterates that the *jus cogens* requires state (*sic*) ....to abstain from establishing discriminatory regulations.."); See also *Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti* (Communication 383/10), Decision of May 2014 of the African Commission on Human and Peoples' Rights, para. 179. For a detailed assessment of the jurisprudence of the Inter-American and European Courts, see Šturma (n 133), at 15 *et seq*.

[162] *Case of Expelled Dominicans and Haitians v Dominican Republic (Preliminary Objections, Merits, Reparations and Costs)*, Judgement of 28 August 2014 of the Inter-American Court of Human Rights, para. 264. See also *Case of Mendoza et al v Argentina*, Judgement of 14 May 2013 of the Inter-American Court of Human Rights, para. 199 ("First, the Court reiterates its case law to the effect that, today, the absolute prohibition of torture, both physical and mental, is part of international *jus cogens*..").

[163] There are, of course, countless statements on *jus cogens* in the context of the Commission's work, in particular its work on the law of treaties. However, *jus cogens* has featured prominently in other contexts. See, for example, statement by Kazakhstan, A/C.6/63/SR.7, para. 55 (favoured the strict and unconditional observance of peremptory norms of international law, which formed the foundation of the modern world order, and supported the efforts of the international community to resolve important issues of the day on the basis of international law.); statement by Azerbaijan, A/C.6/63/SR.8, para. 12; and statement by Tunisia, A/C.6/64/SR12, para. 16.

[164] See for example statement by Mr. Nisirobu (Japan), 2350th meeting of the Security Council on 3 April 1982 ("We stress ... that this is not only one of the most fundamental principles of the Charter, but one of the most important norms of general international law, from which the international community permits no derogation. The principle of the non-use of force is, in other words, a peremptory norm of international law."); statement by Mr. Elaraby (Egypt), 3505th meeting of the Security Council on 28 February 1995 (S/PV.3505) ("On the legal side, there is a consensus in the international community that there exist preemptory (*sic*) norms of international law better known as *jus cogens*. These norms cannot be violated.."); statement by Mr. Koštunica (Serbia and Montenegro), 5289th meeting of the Security Council on 24 October 2005 (S/PV.5289) (".. we are not discussing non-binding obligations of States, but rather, the most stringent norms of international law – the *jus cogens* norms – respect for which is the *sine qua*

before international courts and tribunals — where States are often motivated more by achieving a particular outcome — should be approached with some caution. Nonetheless, it is telling that States frequently refer to *jus cogens* in pleadings before international courts and tribunals and the Special Rapporteur is aware of no case in which, in a case before an international court or tribunal, a State has disputed the notion of *jus cogens* as part of current international law.[165] What is more telling, however, is that even when it would be in the best interest of States to deny *jus cogens* in given cases, they have not done so.[166] References to *jus cogens* in practice have not been limited only to individual statements. United Nations organs themselves, in resolutions, have endorsed the concept as part of international law. Excluding resolutions relating to the Commission's work in which *jus cogens* appeared, the General Assembly has referred to the *jus cogens* in at least 12 resolutions, mainly in the area of torture.[167] It is also worth pointing out that, since the adoption of the draft articles on the law of treaties, the Commission has itself recognized *jus cogens* and its effects, even beyond treaty law.[168]

49. Thus, while there may well be academic debates about the existence, in current international law, of *jus cogens*, States themselves have not questioned its existence. Even the three States that were unconvinced about the Commission taking up the

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*non* for the international community as a whole to function"); statement by Mr. Adekanye (Nigeria), 5474th meeting of the Security Council on 22 June 2006 (S/PV.5474) ("a situation in which a person or entities are included on a list before the affected States are informed is against both the peremptory norms of fair trials and the principle of the rule of law. Nigeria is therefore opposed to any breach of those peremptory norms"); statement by Mr. Mayoral, 5679th meeting of the Security Council on 22 May 2007 (S/PV.5679) ("..the fight against terrorism must be carried out with legal mechanisms based on international criminal law and its basic principles. Let us recall that these are *jus cogens* norms of international law, and thus we cannot set them aside"); Mr. Al-Nasser (Qatar), 5779th meeting of the Security Council (S/PV.5779) ("Article 103 of the Charter provides that obligations under the Charter prevail over other obligations, but this does not mean that they prevail over or supersede pre-emptory (*sic*) norms of *jus cogens*").

[165] See for example, statement by Counsel to Belgium in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Oral Proceedings, 13 March 2012 (CR 2012/3), para. 3.

[166] For example, while Germany sought to limit the effects of *jus cogens* in the *Jurisdictional Immunities* case, its own statement not only did not dispute the existence of *jus cogens* but in fact positively asserted the character of certain norms as *jus cogens*. See, for example, the Memorial of the Federal Republic of Germany in the *Jurisdiction Immunities case* (n 146), 12 June 2009, para. 86 where Germany states: "Undoubtedly, for instance, *jus cogens* prohibits genocide." See also statement by Counsel to Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 146), Oral Proceedings, 15 March 2012 (CR 2012/4), para. 39 and See also Counter-Memorial of Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, para. 51.

[167] See, e.g. para. 3 of General Assembly resolution 68/156 on torture and other cruel, inhuman or degrading treatment or punishment ("*Recalling also* that the prohibition of torture is a peremptory norm of international law and that international, regional and domestic courts have recognized the prohibition of cruel, inhuman or degrading treatment or punishment as customary international law"); para. 3 of General Assembly resolutions 60/148, 61/153 and 62/148, on torture and other cruel, inhuman or degrading treatment or punishment ("*Recalling* also that a number of international, regional and domestic courts, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, have recognized that the prohibition of torture is a peremptory norm of international law and have held that the prohibition of cruel, inhuman or degrading treatment or punishment is customary international law").

[168] See examples cited above in footnote 134.

current topic have not questioned the idea of *jus cogens* itself.[169] As pointed out by Paulus, "the concept of *jus cogens* seems to have lost its controversial character" and "the last consistent opponent among States, France, is said to be willing to make its peace with the concept".[170] For the purposes of the Commission's work on the topic, this debate may well contribute to uncovering some of the intricacies of *jus cogens*, but it should not overshadow the starting point, namely that international law recognizes that there are some rules from which no derogation is permissible.

## B. Theoretical basis for the peremptory character of *jus cogens*

50. As is clear from the above, one of the most enduring elements of the *jus cogens* debate has been the theoretical basis of the peremptoriness of *jus cogens* norms. At different points in the evolution of the concept of *jus cogens*, different theoretical approaches have been advanced to explain the peremptory nature of *jus cogens* norms under international law. There are two main schools of thoughts that seek to explain the nature of *jus cogens,* namely natural law and positivism.[171] In addition to these more general theories, other theories have been advanced. Nonetheless, it is the natural and positive law theories that have dominated the doctrinal debate and it is useful to begin the assessment by a brief sketch and an assessment of those theories. The objective of this analysis is not to resolve the positive law-natural law debate. As with the positive law-natural law debate in the context of international law in general, it is probably not possible to resolve it, nor is it necessary. The various theories advanced to explain *jus cogens* are analysed and assessed with a view to identifying the core character of the concept of *jus cogens*. A caveat is necessary here: there is no natural law theory to *jus cogens*, just as there is no positive law theory to *jus cogens*; there are, rather, natural law theories and positivist theories. However, time and space do not permit a detailed account of each — at any rate a theoretical treatise is not the objective here. Instead, broad brushstrokes of each school of thought are provided.

51. It is useful to begin with the natural law approach, since *jus cogens*, undoubtedly, has its roots in the natural law approach to international law (see sect. IV.A, above).[172] Moreover, to the extent that *jus cogens* implies hierarchy, then natural law, which is premised on the idea of higher norms, whether derived from divinity, reason or some other source of morality, would seem to be a natural basis

[169] See section II, above.

[170] Andreas Paulus "*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at Re-appraisal" (2005) 74 *Nordic Journal of International Law* 297, at 297-298. See, however, Tomuschat (n 50), at 18 ("Yet, Articles 53 and 64 remain among the few controversial provisions of the VCLT which embody the idea of progressive development of the law.")

[171] Asif Hameed "Unravelling the Mystery of *Jus Cogens* in International Law" (2014) 84 *British Yearbook of International Law* 52, suggests that the rival theories should be seen rather as "consent-based" and "non-consent-based" and that the current discourse is based on a misunderstanding of positivism in international law. See especially at 55.

[172] See also Gennady Danilenko *Law Making in the International Community* (Dordrecht, 1993), at 214 and Bruno Simma "The Contribution of Alfred Verdross to the Theory of International Law" (1995) 6 *European Journal of International Law* 33, at 50. See further, Orakhelashvili (n 136), at 37-38 ("Arguably 'the conception of *jus cogens* will remain incomplete as long as it is not based on philosophy of values like natural law' as *jus cogens* grew out of the naturalist school ... *Jus cogens* is similar to natural law in that it is not the product of the will of States and hence not comprehensible through a strict positivist approach.").

for *jus cogens*.[173] Adherents of the natural law approach include, among others, Mark Janis and Mary-Ellen O'Connell.[174] These scholars note that the idea of international rules, superior to and beyond the reach of State consent (or free will of the State) can only be explained through the natural law idea of superior law, which is based on morality and values.

52. While the natural law approach, with its historical links to the emergence of and resemblance to *jus cogens*, is attractive, it is not without its difficulties.[175] The primary difficulty remains the question of who determines the content of natural law. As O'Connell notes, "[c]ontemporary natural law theory still seems to suffer from the subjective reliance on the opinions of scholars, judges or officials".[176] Similarly, Kolb, critiquing the natural law approach, states that "each one of us can postulate norms of justice [but the] question whether these norms are part of positive law [remains] unsettled".[177] Apart from the question of indeterminacy, natural law approaches to *jus cogens* inevitably come up against the text of the Vienna Convention — unless one is to accept that that too is invalid. As Kolb notes, by providing that peremptory norms may only be modified by other peremptory norms, article 53 recognizes that norms of *jus cogens* are not "immutable" — a hallmark of natural law.[178] Similarly, if natural law existed independent of time and space — immutability — then article 64 of the Vienna Convention, which recognizes that "new peremptory norm(s)" may emerge, would be curious to say the

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[173] On the hierarchical implication of *jus cogens* see Danilenko ibid. at 211. See also Hugh Thirlway *The Sources of International Law* (Oxford, 2014), at 155 ("The concept of a peremptory norms implies a hierarchy of norms: a rule of *jus cogens* by definition prevails over a contrary treaty provision"). See also Pierre-Marie Dupuy and Yann Kerbrat *Droit International Public*, (11th Edition, Paris, 2012), at 323, about a new logic ("celle, révolutionnaire, de l'objectivisme inhérent à la notion de normes impératif, lesquelles s'imposent aux Etats devenus ainsi, au sens le plus littéral, sujets d'un ordre juridique alors doté d'une hiérarchie normative, dominée par le *jus cogens*." ["*the revolutionary logic of, objectivism inherent in the notion of peremptory norms, which are binding on States, causes them to become, in the most literal sense, subjects of a legal order that has a normative hierarchy dominated by* jus cogens."] See further, Raphaële Rivier *Droit International Public* (2nd Edition, Paris, 2013), at 565.

[174] See, e.g. Mark Janis "The Nature of *Jus Cogens*" (1987) 3 *Connecticut Journal of International Law* 359, at 361 ("[t]he distinctive character essence of *jus cogens* is such, I submit, as to blend the concept into traditional notions of natural law"); Janis *An Introduction to International Law* (New York, 2008), at 66 *et seq.*; Louis Sohn *The New International Law: Protection of the Rights of Individuals Rather than the State* (1981) 32 *American University Law Review* 1, at 14-15, referring to *jus cogens* as "practically immutable" – language reminiscent of natural law doctrine. Dan Dubois "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?" (2009) 78 *Nordic Journal of International Law* 133, at 134 ("..the conclusion reached is that, in any coherent theory of peremptory norms, one must inevitably have recourse to some conception of natural law"). See also Mary-Ellen O'Connell "*Jus Cogens:* International Law's Higher Ethical Norms" in Donald Childress (ed.) *The Role of Ethics in International Law* (New York, 2012), especially at 97.

[175] See for discussion of these Kolb (n 27), at 31. See also Prosper Weil "Le droit international en quête de son identité: cour général de droit international public" (1992) 237 *Recueil de Cours de l'Académie de droit international de La Haye* 11, at 274; Maurice Kamto "La volonté de l'Etat en droit international" (2004) 310 *Recueil de Cours de l'Académie de droit international de La Haye, 133*, at 353

[176] O'Connell (n 174), at 86-87. At 79, describing the approach of many natural law adherents, she states "[c]urrently it appears that judges and scholars simply consult their consciences when identifying *jus cogens* norms."

[177] Kolb (n 27), at 31.

[178] Ibid., at 33. On immutability, see the authorities cited in footnote 43.

least.[179] An additional issue with natural law approaches to *jus cogens* may be the requirement in article 53 that it be "recognized by the international community of States" – suggesting some role for the "will" of States in the emergence of a *jus cogens* norm.

53. Many contemporary writers, thus, view *jus cogens* from the positivist school.[180] Positive law, at its purest, is based on the idea of the free will of States and that it is only through consent that international law is made. Thus States cannot be bound by rules to which they have not consented.[181] Under a positivist approach to *jus cogens*, norms can only achieve *jus cogens* status once consented to in some way by States. But this seems contrary to, or at least at odds with, the idea of higher set of norms from which no derogation, even if by consent or will of States, is permissible.[182] *Jus cogens* has, after all, even been said to be a revolution against "le froid cynisme positiviste".[183] Moreover, it is difficult to understand, if States have the free will to make any rules, why some rules cannot be derogated from by consent.[184] Even if there were a way to address the question of emergence of peremptory rules through consent — or consensus — it is not clear why those States that have joined in the consensus could not later withdraw their consent, thus damaging the consensus.[185] Whether, as has been suggested, an acceptance of customary international law as the basis for *jus cogens* is an expression of a positive law approach is the subject of the second report.[186]

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[179] Matthew Saul "Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges" (2015) 5 *Asian Journal of International Law* 26 at 31 ("..natural law theories are centred on the identification of certain fixed natural law values, including those related to human needs, whereas the number and nature of *jus cogens* is assumed to develop in accordance with the changing nature of the international community").

[180] See Criddle and Fox-Decent (n 95), at 339. See, e.g. Tunkin (n 106), at 115 ("It is my feeling that norms of general international law having the character of *jus cogens* may be created and are actually created by agreement between States as are other norms of general international law.").

[181] See Criddle and Fox-Decent (n 95), at 339.

[182] See, e.g. Rivier (n 173), at 565 ("l'introduction du droit impératif en droit international est une révolution ...Avec le droit impératif, l'accord de volonté n'est plus en tout hypothèse un mécanisme créateur de droit. La validité des relations dépend aussi de leur contenu. Une définition matérielle du droit est ainsi consacrée, et l'on passe d'une conception traditionnelle du droit international à un modèle objectif dans lequel l'Etat souverain est assujetti à des exigences matérielles supérieurs à sa volonté." [*"the introduction of peremptory norms in international law is a revolution ...With peremptory norms, the agreement between the will* [of States] *is no longer in any case a creative mechanism of law. The validity of relations also depends on their content. A substantive law is so devoted, and one passes from a traditional conception of international law to an objective model in which the sovereign is subject to material obligations higher than its will."*]).

[183] Alain Pellet "Conclusions" in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Boston, 2005), at 419.

[184] *Ibid.* Explaining the natural law theory critique of positivist approaches to *jus cogens*, Kolb (n 27), at 30, states that it "is rooted in precisely that consent or will of States which *jus cogens* is there to limit or even brush aside. It would therefore be circular to explain *jus cogens* on the basis of consent or will." See also generally Tladi and Dlagnekova (n 41), at 112.

[185] Criddle and Fox-Decent (n 95), at 342.

[186] For the view that customary international law as the basis of *jus cogens* necessarily implies a positive law approach see ibid. at 339 ("The leading positivist theory of *jus cogens* conceives of peremptory norms as customary international law that has attained peremptory status through state practice and *opinio juris*".).

54. It should come as little surprise that support for both approaches can be found in judicial practice. The judgments of the International Court of Justice themselves have been less than clear on the basis of *jus cogens*. At times, the Court has appeared to advance a natural law approach to *jus cogens*, while at other times the Court has seemed to rely on positivist and consent-based thinking.[187] Individual opinions of the judges of the Court have been similarly diverse. Many such opinions have expressed *jus cogens* as a rejection of positivism and an embrace of the immutable, natural law approach while others have advanced a positive law approach to *jus cogens*.[188]

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[187] Although the Court in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports* 1951, p. 15, at p. 23, does not describe the prohibition against genocide as *jus cogens*, it seems to describe the prohibition in terms that suggest it is so and, moreover, in a way that places less weight on the consent of States as an element of law (the Court recognises "genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law ...The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required in order to liberate mankind from such an odious scourge. ...its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality"). See also p. 24 where the Court states that the prohibition of genocide has "moral and humanitarian principles [as] its basis". See also *Prosecutor v Jelisić* (IT-95-10-T), 14 December 1999 (ICTY), para. 60, where the Tribunal asserts that in the *Reservations to the Genocide Convention Advisory Opinion*, the International Court of Justice placed the crime of genocide on the level of *jus cogens*. Yet, in perhaps the Court's clearest invocation of *jus cogens*, *Questions Relating to the Obligation to Prosecute or Extradite* (n 146), para. 99 the Court adopted what might be interpreted as a consent-based approach to the identification of *jus cogens*, at least to the extent that customary international law is seen as consent based ("[t]hat prohibition is grounded in a widespread international practice and on the *opinio juris* of States"). Similarly, the Court's tentative reference to the prohibition on the use of force as part of *jus cogens* in the *Military and Paramilitary Activities case* (n 146), at 190 is based, in addition to the Commission's work, on the acceptance of the prohibition by States. There the Court cites, in addition to the Commission's work, frequent reference of the prohibition being *jus cogens* by representatives of States and the fact that both parties to the dispute accept the prohibition as part of *jus cogens*.

[188] See for example, declaration of Judge Bedjaoui in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (n 146), para. 21 ("[a] token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens* ... The resolutely positivist, voluntarist approach of international law still current at the beginning of the century ... has been replaced by an objective conception of international law"); see dissenting opinion of Judge *ad hoc* Kreca in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections*, Judgment of 11 July 1996, *ICJ Reports* 1996, p. 595, para. 43 ("*Jus cogens* creates grounds for a global change in relations of State sovereignty to the legal order in the international community and for the establishment of conditions in which the rule of law can prevail over the free will of States"); separate opinion of Judge Ranjeva in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, Judgment of 10 October 2002, *ICJ Reports* 2002, p. 303, para. 3 ("[o]nly the impact of norms of *jus cogens* can justify any impugnment of the consensus principle."); see separate opinion of Judge *ad hoc* Dugard in *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction of the Court and Admissibility of the Application*, Judgment of 3 February 2006, *ICJ Reports* 2006, p. 6, para. 10; dissenting opinion of Judge

55. The jurisprudence of other courts and tribunals is equally inconclusive about the basis of the binding nature of *jus cogens* norms. In *Furundžija*, for example, the International Tribunal for the Former Yugloslavia linked the *jus cogens* nature of the prohibition of torture to the values underlying the prohibition.[189] On the other hand, decisions of that Tribunal have also highlighted the acceptance by States of *jus cogens* norms.[190] The Inter-American Court of Human Rights, in one of its earliest decisions invoking *jus cogens*, adopted an apparently natural law approach, juxtaposing "the voluntarist conception of international law" with "the ideal of construction of an international community with greater cohesion ... in the light of law of and in search of justice", with the latter reflecting a move "from *jus dispositivum* to *jus cogens*".[191] Similarly, the Court's earlier decisions on the *jus cogens* nature of torture focused on the nature and gravity of torture rather than any State consent to the prohibition.[192] Nonetheless, in several decisions, the Inter-American Court has tended to focus on the consent and consensus as a basis for the *jus cogens* character of certain norms.[193] Moreover, several decisions of the Inter-

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Cançado Trindade in *Jurisdictional Immunities of the State (Germany v Italy), Counter-Claim*, Order of 6 July 2010, *ICJ Reports* 2010, p. 310, para. 134 *et seq.* and at 141 ("State consent and *jus cogens* are as antithetical as they could possibly be."). A distinctly positive law approach is visible in the separate opinion of Judge Schücking in the *Oscar Chinn case* (n 61), at 149, where the *jus cogens* character of a norm is based on agreement of States to the particular rule and an undertaking that such a rule would not be altered by some of them; see also separate opinion of Judge Ammoun in the *Barcelona Traction case* (n 153), at 311-312. See especially, dissenting opinion of Judge de Castro in the *Nuclear Tests Case (Australia v France)*, Judgment of 20 December 1974, *ICJ Reports* 1974, p. 253, at 388 ("[t]he idea that the Moscow Treaty, by its nature, partakes of customary law or *ius cogens* is laid open to some doubt by its want of universality").

[189] See, e.g. *Furundžija* (n 154), para. 153 ("[b]ecause of the values [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens.*"). See also *Prosecutor v Galić*, (IT-98-29-T), 5 December 2003 (ICTY), para. 98. See also *Jelisić* (n 187), para. 60, where the ICTY adopted the value-based definition of the prohibition of genocide advanced by the International Court of Justice definition of genocide.

[190] *Prosecutor v Stakić*, (IT-97-24-T), 31 July 2003 (ICTY), para. 500 ("[i]t is widely accepted that the law set out in the Convention forms part of customary international law and constitutes *jus cogens.").* See also *Jelisić* (n 187), para. 60, where with respect to the crime of genocide, the Court refers to the fact Genocide Convention has become "one of the most widely accepted international instrument relating to human rights.")

[191] *Constantine et al v Trinidad and Tobago*, Judgment of 1 September 2001 (Inter-American Court of Human Rights), para. 38.

[192] *Tibi v Ecuador*, Judgment of September 2004 (IACHR), para. 143, ("[t]here is an international legal system that absolutely forbids all forms of torture ... and this system is now part of *jus cogens.*"); See also *Gómez-Paquiyauri Brothers v Peru*, Judgment of 8 July 2004 (Inter-American Court of Human Rights), para. 112 and *Maritza Urrutia v Guatemala*, Judgment of 27 November 2003, para. 92. A similar trend can be observed in early decisions on the *jus cogens* nature of forced disappearances. See, e.g., *Goiburú et al v Paraguay*, Judgment of 22 September 2006 (Inter-American Court of Human Rights), para. 84 ("faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearances of persons and corresponding obligation to investigate ...has attained the status of *jus cogens*").

[193] *Osorio Rivera and Family Members v Peru*, judgment of 26 November 2013 (Inter-American Court of Human Rights), para. 112, where the Court determined that the prohibition of enforced disappearance has achieved *jus cogens* status on the basis, inter alia, of "international agreement"; *Mendoza et al v Argentina*, Judgment of 14 May 2013 (Inter-American Court of Human Rights), para. 199, where the Court advanced, as basis for *jus cogens* nature of the prohibition of torture "universal and regional treaties"' which "establish this prohibition and the non-derogable right not to be subjected to torture" as well as "numerous international instruments [that] establish that right and reiterate the same prohibition, even under international

American Court have suggested that, contrary to the immutability of the natural law approach, *jus cogens* norms evolve.[194] The support for both consent and natural law approaches can similarly be observed in domestic jurisprudence.[195]

56. The analysis above illustrates that international courts and tribunals have viewed neither of the two dominant theories used to explain the binding nature of *jus cogens* as being, on their own, sufficient.[196] There are, of course, other theories that have been advanced to explain the nature of *jus cogens*.[197] Some of these, however, do not seek to explain so much the binding nature of *jus cogens* but rather to describe the type of norms that can qualify as *jus cogens*.[198] Explaining *jus cogens* as public order norms (*ordre public*), for example, tells us less about the source of their peremptoriness, and more about the nature of the obligations in question.[199] Put another way, describing the prohibition of genocide or the use of force as a public order norm does not tell us why it is peremptory, but only that those norms reflect fundamental values of the international community. The peremptory nature of public order norms could themselves be explained by either consent or non-consent based theories.

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humanitarian law." Similarly, in *Almonacid-Arellano et al v Chile*, Judgment of 26 September 2006, para. 99-99, the Court concludes that in 1973 the prohibition of crime against humanity was already *jus cogens* on the basis of several General Assembly resolutions and common article 3 of the Geneva Conventions.

[194] See, e.g., *Nadege Dorzema et al v Dominican Republic*, Judgment of 24 October 2012 (Inter-American Court of Human Rights), para. 225 ("[a]t the current stage of the evolution of international law, the basic principle of equality and non-discrimination has entered the domain of *jus cogens*."); See also *Atala Riffo and Daughters v Chile*, Judgment of 24 February 2012 (Inter-American Court of Human Rights), para. 79. See especially, *Dacosta Cadogan v Barbados*, Judgment of 24 September 2009 (Inter-American Court of Human Rights), para. 5 ("[t]he day must come when universal consensus – which for now does not appear too near – establishes the prohibition of capital punishment within the framework of *jus cogens*, as is the case with torture").

[195] For an apparently natural law approach, see *Siderman v Argentina*, Judgment of 22 May 1992 of the United States Court of Appeal, Ninth Circuit, 965 F.2d 699, especially at 715, which defines and discusses the nature of *jus cogens* in international law, its relationship to and distinction from customary international law (*jus dispositivum*), particularly the place (or lack thereof) of consent in the formation of *jus cogens* norms, the superiority of *jus cogens* over other norms of international law ("[w]hile *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law … is not bound by that norm … In contrast *jus cogens* …is derived from values taken to be fundamental by the international law community… the fundamental and universal norms constituting *jus cogens* transcend such consent"). See also *Kenya Section of the International Commission of Jurists v Attorney General & Another* (n 161) at 14. For what appears to be a more positivist approach, see the opinion of Lord Hope in *Pinochet* (n 161), at 247, referring to *Siderman v Argentina* as evidence of "widespread agreement" of the *jus cogens* character of torture.

[196] See, e.g. Criddle and Fox-Decent (n 95), at 332 ("[p]ositivists efforts to link peremptory norms to state consent are unconvincing because they do not explain why a majority of States within the international community may impose legal obligations on a dissenting minority. While natural theories circumvent this persistent objector problem, they struggle to specify analytical criteria for identifying peremptory norms.").

[197] See Kolb (n 27) at 30 *et seq*.

[198] The most of important of these, *jus cogens* as public order norms (*ordre public*), is discussed further below. Others include *jus cogens* as rules of international constitutional law, and rules for conflict of successive treaties.

[199] See for discussion Criddle and Fox-Decent (n 95), at 344.

57. Other theories, upon closer inspection, represent variations of the dominant theories.[200] Kolb's alternative theory of *jus cogens*, for example, appears to be an application of the positivist approach.[201] Kolb advances, as an alternative theory, the idea that *jus cogens* is a "legal technique engrafted by the legislature onto a certain number of international norms in order to protect them from the fragmentation into particular legal acts enjoying priority application *inter partes* because of the *lex specialis* principle".[202] Whether the particular "types" or categories of *jus cogens* norms identified by Kolb are justified relates to the identification of *jus cogens*,[203] which is the topic of the second report. More relevant for the present discussion, that is, understanding the peremptory or non-derogability of *jus cogens* norms, is that Kolb's theory itself presupposes a decision of the "legislature" or States and, thus, adopts a positivistic or consent-based leaning.[204]

58. Criddle's and Fox-Decent's fiduciary theory of *jus cogens*, which has as its stated purposes to move away from both natural and positive law, is equally open to question, both in terms of whether it is really a move away from the dominant theories and in terms of its substance.[205] According to this theory, "a fiduciary principle governs the relationship between the state and its people, and this relationship requires the state to comply with peremptory norms".[206] First, while the fiduciary duty is aimed, inter alia, at addressing the vague notions of "international conscience" or a "superior order of norms",[207] it itself is equally vague. More important, the notion that *jus cogens* is based on a fiduciary relationship between a

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[200] For example, although Kolb suggests that Judge Cançado Trindade advances a separate, alternative theory of a new *jus gentium*, in fact a close reading of Cançado Trindade's individual opinions and works reveals that this is also based on a natural law understanding of *jus cogens*. See, e.g. Antônio Cançado Trindade "*Jus Cogens:* The Material and the Gradual Expansion of its Material Content in Contemporary International Case Law" (2008) 35 *Curso de Derecho International Organizado por el Comité Jurídico Interamericano* 3, at 6 ("[t]his latter [the *jus gentium]* does not emanate from the 'will' of States, but rather, in my view, from the human conscience"). See, for an example of one of many dissenting and separate opinions of Judge Cançado Trindade, the dissenting opinion in *Jurisdictional Immunities of the State* case (n 136), at para. 139 ("and no one would dare today deny that the 'principles of humanity' and the 'dictates of the public conscience' invoked by the Martens clause belong to the domain of *jus cogens*").

[201] See generally Robert Kolb "Conflits Entre Normes de *Jus Cogens"* in Nicolas Angelet (ed.), *Droit du Pouvoir, Pouvoir du Droit: Mélanges Offerts à Jean Salmon,* (Bruxelles, 2007) and Kolb (n 27).

[202] Kolb (n 27), at 9. *Cf.* Andrea Bianchi "Human Rights and the Magic of *Jus Cogens"* (2008) 19 *European Journal of International Law* 491, at 495 ("[t]o hold that *jus cogens* is nothing but a legal technique aimed at preserving the formal integrity of the system by characterising as inderogable some of its procedural norms is tantamount to overlooking what the function performed by *jus cogens* was meant to be.").

[203] Kolb (n 23), at 46, identifies three types of *jus cogens* norms or, as he states, "in clearer terms, three reasons which may lead a norm to be non-derogable or unfragmentable". These are, public order *jus order* norms, or fundamental norms of international law (although he accepts this type of *jus cogens* with some hesitation); public utility *jus cogens* and logical *jus cogens*. Elsewhere, Kolb identified four types of *jus cogens*, the additional type being the peremptory law of the Charter of the United Nations as set out in Article 103. See Kolb (n 201), at 486.

[204] Kolb (n 27), at 9. Indeed, even for public order *jus cogens*, Kolb scoffs at the "lofty sentiments and sometimes fairy-tale adoration of 'the fundamental rules of international community'" (at 47).

[205] See, generally Criddle and Fox-Decent (n 95).

[206] Ibid. at 347.

[207] Ibid. at 248.

State and its subjects would simply not be able to address many generally accepted norms of *jus cogens* since these prohibit conduct not only against a State's own subjects. For example, genocide is no less a violation of *jus cogens* if committed against the nationals of another State. In fairness, Criddle and Fox-Decent do suggest that "States owe every individual subject to state power a fiduciary obligation to respect their human rights", but this neither explains why such an obligation flows from *jus cogens* nor how violations of *jus cogens* which do not per se constitute violations of human rights are covered by this theory.[208] Moreover, any theory that seeks to explain *jus cogens* in terms of the relationship between the State and individual would find it difficult to explain the prohibition on the use of force as *jus cogens*, since that prohibition relates to inter-State relationships and not, at least not directly, State to individuals relationships.

59. No single theory has yet adequately explained the uniqueness of *jus cogens* in international law, that is, the peremptoriness of certain obligations. It may even be, as suggested by Koskenniemi advancing a general theory of sources, that the binding and peremptory force of *jus cogens* is best understood as an interaction between natural law and positivism.[209] Speaking of sources and the natural-positive law debate, Koskenniemi states that "[n]aturalism needs positivism to manifest its content in an objective fashion", while "[p]ositivism needs natural law in order to answer the question 'why does behaviour, will or interest create binding obligation'"?[210] Indeed, it is not necessary for this project to resolve the theoretical debate. Nonetheless, the theoretical debate is important because from it, the core elements of *jus cogens* — those elements that are widely shared across the doctrinal perspectives — can be deciphered.

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[208] Ibid. at 359. At p. 333, the authors accept that the prohibition of "military aggression" qualifies as *jus cogens*, particularly where such aggression does not result in human rights violations.

[209] See Martti Koskenniemi *From Apology to Utopia: The Structure of Legal Argument (Reissue with new Epilogue)* (Cambridge, 2006), at p. 307 *et seq*, especially at p. 308 ("..neither contrasting position can be consistently preferred because they also rely on each other"). At p. 323, specifically on *jus cogens*, he says: "Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented would seem to collapse into a natural morality [but] the reference to recognition by 'international community" [makes it] ascending, consensualist." See also Simma (n 172), at 34 ("I consider that none of [the schools of philosophy of law] can give an all-embracing, definite explanation of, or justification for, the phenomenon of law, but I am also convinced that they do not exclude each other, that, on the contrary, each of them can unveil and illuminate aspects of international law which remain inaccessible or off-limits to the other." See also Orakhelashvili (n 136), at 49 (referring to "positive law and morality as two separate but mutually complementary concepts").

[210] Ibid. Elsewhere, Martti Koskenniemi *The Politics of International Law* (Oxford, 2011), 52, has stated that neither consent (positivism) not justice (natural law) "is fully justifiable alone … Arguments about consent must explain the relevance and content in terms of what seems just. Arguments about justice must demonstrate their correctness by reference to what States have consented to." See also Daniel Costelloe *Legal Consequences of Peremptory Norms in International Law* (unpublished PhD thesis, University of Cambridge, 2013), at 3 ("[w]hile 'elementary considerations of humanity' are not a free-standing source of obligation in international law, they may further the identification of those norms and obligations in whose integrity and enforcement the international community has a strong interest"). See also Hameed (n 171), 54 who advances a non-consensual theory of *jus cogens* that is underpinned by morality and that nonetheless appears to be based on the acceptance of States ("[t]his essay will strive to show how we can more effectively explain *jus cogens* law-making without relying on the idea of consent. I propose that an existing rule of international law becomes *jus cogens* because it is believed by certain legal officials – principally States – to be morally paramount.").

60. These more theoretical issues will, in future reports, contribute to an understanding of the judicial and State practice.

## C. Core elements of *jus cogens*

61. Article 53 of the Vienna Convention contains the basic elements of *jus cogens*. First, a norm of *jus cogens* is one from which no derogation is permitted. Secondly, it is a norm of general international law. Thirdly, a norm of *jus cogens* is one that is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. In addition to these, however, practice and doctrine reveal a core set of elements that give more content to the notion of *jus cogens*.

62. The element of non-derogation serves a dual function. First, it is a consequence of peremptoriness. However, it is also an important element of the nature of *jus cogens*.[211] Indeed, as the analysis below shows, non-derogation is at the heart of the idea of *jus cogens*. The requirement that, to be *jus cogens*, a norm must be a norm of general international law is also a key requirement of peremptoriness. It is not only a requirement for peremptoriness, it is also an element for its identification. This element will be considered in the second report, not only as an element for the identification of *jus cogens*, but also to clarify what sources of law gives rise to peremptoriness. Similarly, the requirement that norms of *jus cogens* must be "recognized by the international community of States as a whole" will be considered in the second report as an element in the identification of *jus cogens*, or the elevation of an ordinary norm of general international law to one of *jus cogens*.

63. In addition to the elements explicitly referred to in article 53 of the Vienna Convention, however, doctrine and practice reveal that there are certain core elements that characterize *jus cogens* norms. First, *jus cogens* norms are universally applicable. Secondly, *jus cogens* norms are superior to other norms of international law. Finally, *jus cogens* norms serve to protect fundamental values of the international community — what has often been described as international *ordre public* or public order. While these elements are not explicitly spelled out in article 53 of the Vienna Convention, as the analysis below will show, they are generally accepted as forming important elements of *jus cogens*.

64. Doctrine and practice reveals that *jus cogens* norms are those from which no derogation is permitted. While, as stated above, this is a consequence of peremptoriness, it is also a fundamental characteristic of *jus cogens* norms. It is useful to point out that, in international law, the idea that some rules are peremptory and cannot be derogated from through ordinary means of law-making is exceptional.[212] The majority of rules of international law fall into the category of *jus dispositivum* and can be amended, derogated from and even abroated by consensual acts of States.[213] However, the literature has also recognized, as an exception to the

[211] Kolb (n 27), at 2 ("The key term for the classical formulation of *jus cogens* is therefore 'non-derogability'. In other words, *jus cogens* is defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation").

[212] Carnegie Endowment (n 31), at 27 ("Norms of general international law are essentially dispositive in character").

[213] Alfred Verdross "*Jus Dispositivum* and *Jus Cogens* in International Law" (1966) 60 *American*

general structure of international law, a set of norms from which States cannot contract out.[214] These norms are, to use the words of one commentator, "potent enough to invalidate contrary rules which might otherwise be consensually established by States".[215] In short, writings of international law, irrespective of theoretical differences, converge on the idea that the majority of rules are *jus dispositivum* and "can be excluded or modified in accordance with the duly expressed will of States" while, exceptionally, some rules are *jus cogens* and cannot be so excluded or modified.[216]

65. The judicial practice also bears testimony to the fact that while, as a general rule, States are free to amend, derogate from and abrogate rules of international law, there may be some rules which are so fundamental that States cannot amend or from which States cannot derogate by consent.[217] Already in the *North Sea Continental Shelf Cases*, although not willing to pronounce itself on the question of *jus cogens*, the International Court of Justice drew attention to the distinction between *jus*

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*Journal of International Law* 55, at 60 ("[t]here was clearly consensus in the Commission that the majority of the norms of international law do not have the character of *jus cogens*."). Tomuschat (n 50), at 19 ("[m]ost of the rules of international law are *jus dispostivum*"). Merlin Magallona "The Concept of *Jus Cogens* in the Vienna Convention on the Law of the *(sic)* Treaties" (1976) 51 *Philippine Law Journal* 521, at 521 ("*jus dispositivum* rules [which] can be derogated by private contracts"). See also Alexidse (n 30), at 245. See also Aldana Rohr *La Responsabilidad Internacional Del Estado Por Violación Al Jus Cogens* (Buenos Aires, 2015), at 5 ("por un lado, aquellas de naturaleza dispositiva – *jus dispositivum* – las más numeosasa, creada por acuerdo de voluntades, derogables también por acuerdos de voluntades" ["*most of the rules* [of international law] *have a dispositive character* – jus dispostivum – *created by an agreement of wills, which can also be derogated by an agreement of wills*"]).

[214] See, e.g., Rohr (n 213), at 5 ("por otro lado, las normas de derecho perentorio o imperativo – *jus cogens* – pertenecientes a un sistema que podría entenderse como de cuasi-subordinación normativa, que limita, en cierta manera, la voluntad estatal derivada de su propia soberenía." ["*On the other hand, there are peremptory norms, imperative norms* – jus cogens – *belonging to a system that can be understood as normatively quasi-subordinated, which somehow limits State sovereign will and promote a vertical system of law*."] See also Stefan Kadelbach "*Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms" in Tomuschat and Thouvenin (n 183), at 29; Thirlway (173) ("not all international rules belong to the domain of *jus dispositivum*, that is ...rules that apply failing agreement to the contrary but which can be set aside ... by agreement."). See further Hannikainen (n 214), at 1.

[215] Janis "The Nature of *Jus Cogens*", (n 174), at 359. See also Dubois (n 174), at 135 ("A *jus cogens* or peremptory norm is a norm that is thought to be so fundamental that no derogation from it is allowed, whether through State behaviour or through treaty ....Because of its fundamental nature, a principle that is *jus cogens* invalidates rules that are drawn from treaty .... This separates *jus cogens* norms from those that are *jus dispositivum*, meaning norms that can be excluded or altered by the express will of States."). See also Alexidze (n 30), at 246 ("...the will of State regarding the existent international legal order is not unlimited. Though the majority of international law rules bind a State only under the condition that the latter has expressed its will to accept a given rule, contemporary international law contains rules whose legal force is absolute for each member of the international community of States.").

[216] See for discussion, Orakhelashvili (n 136), at 8-9.

[217] See *Prosecutor v Kupreškić et al* (IT-95-16-T), 14 January 2000 (ICTY), para. 520 (" most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms or *jus cogens*, i.e. of a non-derogable and overriding character."). See also *RM & another v Attorney General*, Judgment of 1 December 2006 of the High Court of Kenya *Kenyan Law Reports*, at 12. See also *Siderman v Argentina* (n 195).

*cogens* and *jus dispositivum*.[218] *Jus cogens*, thus, has the potency to limit the freedom of States to contract.[219]

66. The distinction between *jus dispositivum*, which is subject to the agreement of States, and *jus cogens*, from which States cannot escape by agreement, has also been recognized by States themselves.[220] Certainly, this distinction was generally accepted by States in the processes leading up to the adoption of the Vienna Convention and formed the basis of the agreement of the text of article 53 of the Convention.[221] The idea that there were rules from which States could not contract

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[218] See *North Sea Continental Shelf Cases* (n 128), para. 72 ("[w]ithout attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties."). For a more explicit recognition of the distinction between *jus cogens* and *jus dispositivum* see dissenting opinion of Judge Tanaka in the *South West Africa Cases* (n 130), at 298 ("*jus cogens*, recently examined by the International Law Commission, [is ] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States") and Separate opinion of Judge Shahabuddeen in the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Judgment of 14 June 1993, *ICJ Reports* 1993, p. 38, para. 135 ("States are entitled by agreement to derogate from rules of international law other than *jus cogens*"). See also Separate opinion of Judge *Ad Hoc* Torres in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010, *ICJ Reports* 2010, p. 14, para. 43 ("[a]s the rules laid out in Articles 7 to 12 of the Statute of the River Uruguay are not peremptory norms (*jus cogens*), there is nothing to prevent the Parties from deciding by 'joint agreement'").

[219] *Reservations to Genocide Convention Advisory Opinion* (n 187), at 24 ("[t]he object and purpose of the Convention thus limit the freedom of making reservation"). See also Separate opinion of Judge Schücking in *The Oscar Chinn case*, Judgment of 12 December 1934, PCIJ, Ser. A/B No. 63, p. 65, at 148 ("[a]nd I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by only some of their number, any act adopted in contravention of that undertaking would be automatically void."); Dissenting opinion on Judge Fernandes in the *Right of Passage case* (n 129), para. 29 ("[s]everal rules *cogentes* prevail over any special rules. And the general principles to which I shall refer later constitute true rules of *ius cogens*, over which no special practice can prevail"); Separate opinion of Judge Sette-Cama in the *Military and Paramilitary Activities case* (n 146), at 199; Dissenting opinion of Judge Weeramantry in the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment of 12 November 1991, *ICJ Reports* 1991, p. 53, at 155 ("..a treaty which offends against a rule of *jus cogens*, though complying fully with all the requirements of procedural regularity in its creation, can still be null and void owing to a factor lying outside those procedural formalities.") See also dissenting opinion of Judge de Castro in the *Nuclear Tests case (Australia v France)*, Judgment of 20 December 1974, *ICJ Reports* 1974, p. 253, at 389, wherein the *jus cogens* status of a treaty provision is questioned because of, inter alia, the right to withdraw.

[220] See for example, statement by Mr. Elaraby (Egypt), 3505th meeting of the Security Council on 28 February 1995 (S/PV.3505) ("[o]n the legal side, there is a consensus in the international community that there exist preemptory (*sic*) norms of international law better known as *jus cogens*. These norms cannot be violated …Under these comprehensive and binding rules, no party can argue that any bilateral agreement, of whatever kind, allows it to deny the right of the international community to discharge its fundamental responsibility"); statement by Mr. Mayoral, 5679th meeting of the Security Council of 22 May 2007 (S/PV.5679) ("..these are *jus cogens* norms of international law, and thus we cannot set them aside"). See especially, statement by Sweden, *Official Records of the General Assembly, Twentieth Session, Summary Records of the Sixth Committee*, 844th meeting, para. 11.

[221] See, e.g., statement by Mr. Jacovides (Cyprus), *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, A/CONF.39/11, Fifty-second Meeting, para. 68 ("beside *jus dispositivum* there was a *jus*

out was not the subject of much disagreement at the Vienna Conference.[222] The work of the Commission, itself, on what eventually became article 53 of the Convention was based on an understanding that in international law, a distinction can be made between *jus dispositivum* and *jus cogens*.[223]

67. Norms of *jus cogens*, as distinct from *jus dispositivum*, are also generally recognized as being universally applicable.[224] As a point of departure, the majority of international law rules are binding on States that have agreed to them, in case of treaties, or at the very least, to States that have not persistently objected to them, in the case of customary international law (*jus dispositivum*).[225] *Jus cogens*, as an exception to this basic rule, presupposes the existence of rules "binding upon all members of the international community".[226] In reality, the characteristic of

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*cogens*"); statement by Mr. Yasseen (Iraq), ibid., para. 23 and the statement of Mr. Ogundero (Nigeria), ibid., para. 48. See also statement by Mr. Sinclair (United Kingdom), ibid., Fifty-third meeting, para. 58 ("in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out").

[222] See statement by Mr. Suarez (Mexico), ibid., 52nd meeting, para. 9 ("[t]he emergence of a new rule of *jus cogens* would preclude the conclusion in the future of any treaty in conflict with it"); Mr. Evrigenis (Greece), ibid., para. 18 ("and which indicated the boundaries that could not be violated by the contractual will"); statement by Mr. Sweeney (United States), ibid., para. 16 ("the very fundamental proposition of the Commission that *jus cogens* included rules from which no derogation was permitted.."); statement by Mr. Alvarez Tabio (Cuba), ibid., para. 34 (*jus cogens* "had the effect of overriding any other rules that came into conflict with them…even where the lesser rule was embodied in a treaty, as it was not permissible to contract out of a peremptory norm of general international law"). See, however, Mr. Miras (Turkey), ibid., 53rd meeting, para. 1, and the statement by Mr. Harry (Australia), ibid., para. 13.

[223] See, e.g. Third report on the law of treaties by Mr. GG Fitzmaurice, Special Rapporteur (n 74), at 40 para. 76 ("[t]he rules of international law in this context fall broadly into two classes—those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime, or, more correctly, those the variation or modification of which under an agreed regime is permissible, provided the position and rights of their States are not affected.").

[224] See, e.g. William Conklin "The Peremptory Norms of the International Community" (2012) 23 *European Journal of International Law* 837, at 837. See also Christos Rozakis *The Concept of* Jus Cogens *in the Law of Treaties* (Amsterdam, 1976), at 78. See also Giorgio Gaja *"Jus Cogens* Beyond the Law of Treaties" (1981) 172 *Recueil de Cours de l'Académie de droit international de La Haye* 271, at 283. See further Hannikainen (n 214), at 5 ("Because the purpose of *jus cogens* is to protect certain overriding interests and values of the international community of States, and peremptory obligations are owed to this community, only the *universality* of peremptory obligations ensures the fulfilment of *jus cogens*") (emphasis original).

[225] See, for the persistent objector rule, draft conclusion 15 of the draft conclusions on the identification of customary international law (n 29).

[226] See, e.g. Danilenko (n 172), at 211.; Alexidze (n 30), at 246; Dupuy and Kerbrat (n 170), at 322 ("la cohésion de cet ensemble normatif exige la reconnaissance par tous ses sujets d'un minimum de règles *impératives*" ["the cohesion of this set of norms requires recognition by all its subjects of a minimum of peremptory rules"]); Rohr (n 213), at 6; Criddle and Fox-Decent (n 95) at 361 ("peremptory norms must embody general and universal principles"); Dubois (n 174), at 135 ("A *jus cogens* …is applicable to all States regardless of their consenting to it"). See also Orakhaleshvili (n 136), at 40. See also Saul (n 179), at 31 ("*Jus cogens* norms supposed to be binding on all States"). See *Military and Paramilitary Activities case* (n 146), para. 190 ("[t]he United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'"); See also *Reservations to the Genocide Convention Advisory Opinion* (n 187), at 23 where the International Court of Justice refers to "the universal character …of the condemnation of genocide"; separate opinion of Judge Moreno Quintana in the *Application of the*

universal applicability flows from the notion of non-derogability, that is, it is difficult to see how a rule from which no derogation is permitted can apply to only some States. Indeed as the Commission indicated in its commentary to draft article 50 of the 1966 draft articles, many who disputed the existence of *jus cogens* did so on the basis that rules of international law were not universally applicable.[227] But it flows also from the idea, in article 53 of the Vienna Convention, that *jus cogens* norms are norms of general international law — a characteristic that will be studied in greater detail in the next report.

68. The idea that *jus cogens* norms are universally applicable has itself two implications that will be the subject of more detailed study in future reports — what is said here, is therefore provisional. First, the doctrine of the persistent objector, whatever its status with respect to customary rules of international law, is not applicable to *jus cogens*.[228] This aspect, however, deserves further study and will be addressed more fully in the report on the consequences of *jus cogens*. A second, and more complicated, implication of universal application is that *jus cogens* norms do not apply on a regional or bilateral basis.[229] While there are some authors that hold the view that regional *jus cogens* is possible,[230] the basis for this remains somewhat obscure. Since, if it exists, regional *jus cogens* would be an exception to this general principle of universal application of *jus cogens* norms. The subject of whether international law permits the doctrine of regional *jus cogens* will be considered in the final report, on miscellaneous issues.

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*Convention of 1902* (n 130), at 106 ("[t]hese principles .... have a peremptory character and a universal scope"); dissenting opinion of Judge ad hoc Kreca in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 188), para. 101 ("the norm prohibiting genocide as a universal norm binds States in all parts of the world"); separate opinion of Judge Cançado Trindade in *Questions Relating to the Obligation to Extradite or Prosecute* (n 135), para. 102 ("*jus cogens* [is based] on the very foundations of a truly universal international law"). See *Jelisić* (n 187), para. 60, quoting with the approval the International Court of Justice's statement concerning the universal application of the prohibition of genocide and linking it directly to the *jus cogens* character of the prohibition. See *Tel-Oren v Libyan Arab Republic*, Judgment of 3 February 1984 of the United States Court of Appeal, District of Columbia, 726 F.2d 774, 233 U.S.App. D.C. 384 (there are a "handful of heinous actions—each of which violates definable, universal and obligatory norms").

[227] See para. (1) of the commentary to draft article 50 of the draft articles on the law of treaties (n 99) ("some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal").

[228] Criddle and Fox-Decent (n 95), at 340 *et seq.* Rohr (n 213), at 19. See also Dino Kritsiotis "On the Possibilities Of and For Persistent Objection" (2010) 21 *Duke Journal of Comparative and International Law* 121, at 133 *et seq.* See *contra* Gennady Danilenko "International *Jus Cogens*: Issues of Law-Making" (1991) 2 *European Journal of International Law* 42, at 54 *et seq.*

[229] Orakhelashvili (n 136), at 39 *et seq.*

[230] See, e.g, Władysław Czapliński "*Jus Cogens* and the Law of Treaties" in Tomuschat and Thouvenin (n 183), at 93 and Kolb (n 27), at 98. See Mathias Forteau "Regional International Law" in Rudiger Wolfrum (ed.) *Max Planck Encyclopaedia of Public International Law* (2006, online edition), para. 21, although it should be said that the author adopts a rather restricted view of "regional international law", including *jus cogens* ("nowadays the fact that an international rule is regional in nature is deprived, as such, of any autonomous legal consequences. Regional international law reveals itself as being no more than a factual, not a legal, concept").

69. Closely related to non-derogability, *jus cogens* norms are hierarchically superior to other norms of international law.[231] The idea of rules capable of invalidating others and permitting no derogation implies a normative hierarchy.[232] The idea that *jus cogens* can invalidate other rules of law is both a result and reflection of normative superiority.[233]

70. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice observed that the "question whether a norm is part of the jus cogens relates to the legal character of the norm".[234] The legal character of *jus cogens* norms is often linked with values relating to public order. Kolb, himself suspicious of the public order/value approach to *jus cogens*, states that it "is the absolutely predominant theory" today.[235] Simply put, the content

[231] See *Furundžija* (n 154), para. 153 (a feature of the prohibition of torture "relates to the hierarchy of rules in the international normative order … this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules"). See, also separate opinion of Judge Lauterpacht in the *Application of the Genocide Convention case* (n 153), para. 100 ("The concept of *jus cogens* operates as a concept superior to both customary international law and treaty"); Separate opinion of Judge ad hoc Dugard in the *Armed Activities in the Congo case* (n 188), para. 10. See also dissenting opinion of Judge Al Khasawneh in the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgement of 14 February 2002, *ICJ Reports* 2002, p. 3, para. 7. See also statement by Netherlands, A/C.6/68/SR.25, para. 101 ("*Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law"). See, however, Kolb (n 27), at 37 suggesting that the language of hierarchy should be avoided and that the focus should be on voidness since the former concept – of hierarchy – leads to confusion and misunderstanding.

[232] See conclusion 6 of the conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251), *Yearbook…2006*, vol. II (Part Two), p. 177, at p. 182 ("[a] rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 VCLT), that is, norms "accepted and recognized by the international community of States as a whole from which no derogation is permitted'"). See, also, e.g., Danilenko (n 228), at 42. Conklin (n 224), at 838 ("the very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the 'fundamental standards of the international community' at the pinnacle"). See also Marjorie Whiteman "*Jus Cogens* in International Law, With a Projected List" (1977), 7 *Georgia Journal of International and Comparative Law* 609, at 609; Janis "The Nature of *Jus Cogens*" (n 174), at 360. See further Report of the Study Group of the International Law Commission on Fragmentation Of International Law: Difficulties Arising From the Diversification and Expansion of International Law (finalized by Martti Koskenniemi), 13 April 2006 (A/CN.4/L.682); and Tomuschat "Reconceptualising the Debate on *Jus Cogens* and Obligations *Erga Omnes:* Concluding Observations" in Tomuschat and Thouvenin (n 183), at 425 ("One thing is certain, however: the international community accepts today that there exists a class of legal precepts which is hierarchically superior to 'ordinary' rules of international law"). See further Dupuy and Kerbrat (n 170), at 323.

[233] Antonio Cassese "For an Enhanced Role of *Jus Cogens*" in Antonio Cassese (ed.) *Realizing Utopia: The Future of International Law* (Oxford, 2012), at 159.

[234] *Legality of the Threat or Use of Nuclear Weapons Advisory opinion* (n 146), para. 83.

[235] Kolb (n 27), at 32. Although having domestic law origins, in particular from the civil law tradition, this tradition is now firmly rooted in international law. See Orakhelashvili (n 136), at 11 *et seq;* Rivier (n 173), at 567. See also on the links between civil law *ordre public* and international law *ordre public*, separate opinion of Judge Moreno Quintana in the *Case Concerning the Application of the Convention of 1902*, at 106.

of these public order norms are aimed at protecting the fundamental values of the international community.[236] As explained earlier, while public order is often presented as a separate theory, competing with natural and positive law theories to explain the source of peremptoriness, it appears more suited to explain the quality of the norms. Indeed public order norms can be explained in terms either of positive or natural law theories.

71. The values which are protected by *jus cogens* norms — those that constitute "the fundamental values of the international law community" — are those that have been said to be "toutes d'essence civilisatrice".[237] They are concerned with the basic considerations of humanity.[238] The description by the International Court of Justice of the values underlying the Convention on the Prevention and Punishment of the Crime of Genocide, though not expressly invoking *jus cogens*, provides an apt description of the values characterizing *jus cogens*.[239] In that case, the Court described the values underlying the Genocide Convention as follows:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose ... to safeguard the very existence of certain human groups and ... to confirm and endorse the most elementary principles of morality.

72. While these are core characteristics, as opposed to requirements, of *jus cogens*, they do not tell us how *jus cogens* norms are to be identified in contemporary international law. Moreover, while some of these characteristics also reflect the consequences of *jus cogens*, the consequences will be the subject of a more detailed future report. The fluid interplay between the various elements of the topic — nature, requirements, consequences — was already alluded to in the earlier parts of the present report and the connections described in this section are a reflection of that interconnection.

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[236] *Furundžija* (n 154), para. 153, stating that the prohibition of torture is *jus cogens* "[b]ecause of the importance of the values it protects". See also Dissenting opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State* (n 153), para. 143.

[237] Kolb (n 201), at 482.

[238] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2007) (n 146), para. 160 ("[t]hat is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values") and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2015) (n 146), para. 85. See also dissenting opinion of Judge Koroma in the *Nuclear Weapons Advisory Opinion* (n 136) para. 573 (*jus cogens* has "humanitarian underpinnings" and is based on "values of member States"); See further the dissenting opinion of Judge Al Khasawneh in the *Arrest Warrant case* (n 231), para. 7. See also *Siderman v Argentina* (n 195), at 715.

[239] *Reservations to Genocide Convention Advisory Opinion* (n 187), at 23 *et seq.*. See also Patrizia Bisazza "Les crimes à la frontièrs du *jus cogens*" in Laurent Moreillon, Andre Kuhn, Aude Bichovsky, Aline Willi-Jayet, Baptiste Viredaz (eds) *Droit Pénal Humanitaire* (Bruxelles, 2006), at 78, who evokes "une conscience commune de l'humanité" and Laurence Boisson de Charzounes "Commentaire" in Karel Wellens, Rosario Huesa Vinaixa (eds) *L'influence des sources sur l'unité et la fragmentation du droit international: travaux du séminaire tenu à Palma, les 20 et 21 Mai 2005* (Bruxelles, 2006), at 77, referring to a "conscience universelle". See also Stefanie Schmahl "An Example of *Jus Cogens:* The Status of Prisoners of War" in Tomuschat and Thouvenin (n 183), at 49.

## VI. Form of the Commission's product

73. The Special Rapporteur is of the view that draft conclusions are the most appropriate outcome for the Commission's work on the topic. The syllabus, which formed the basis of the Commission's decision to embark on the project, proposed draft conclusions as the appropriate format. Moreover, draft articles would not be an appropriate format since, like the Commission's work on identification of customary international law and subsequent practice and subsequent agreements in relation to treaty interpretation, the essential character of the work on this topic should be to clarify the state of the law based on current practice. The Commission's draft conclusions will reflect the current law and practice on *jus cogens* and will avoid entering into the theoretical debates that often accompany discussions on *jus cogens*.

## VII. Conclusions

74. In the light of the analysis above, the Special Rapporteur proposes the following draft conclusions for consideration by the Commission.

**Draft conclusion 1**
**Scope**

The present draft conclusions concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them.

**Draft conclusion 2**
**Modification, derogation and abrogation of rules of international law**

1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (*jus dispositivum*). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character.

**Draft conclusion 3**
**General nature of *jus cogens* norms**

1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.

## VIII. Future work

75. The future work of the Commission will be determined by the membership of the Commission in the next quinquennium. The Special Rapporteur, however, would propose that the next report be dedicated to the rules on the identification of norms of *jus cogens*. This will include the question of the sources of *jus cogens*, that is, whether *jus cogens* emanate from treaty law, customary international law, general principles of law or other sources. Related to question of sources, but also more broadly concerning the identification of *jus cogens*, the second report will also consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties.

76. The third report, in 2018, might consider the consequences of *jus cogens*. The fourth report might address miscellaneous issues that arise from the debates within the Commission and comments from States. It will also offer an opportunity to assess the draft conclusions already adopted with a view to enhancing their overall coherence.

77. As stated earlier, the approach to this topic will necessarily need to be flexible and the road map described herein ought not to be cast in stone. It may change, depending on the direction that the Commission may steer it in.